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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

No. 128

S. H. P. VEVELSTAD and AURORA NICKEL COMPANY, a corporation,
*Petitioners,*

vs.

E. MILES FLYNN,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.**

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**PETITION FOR A WRIT OF CERTIORARI**
**to the United States Court of Appeals**
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*To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

The petition of S. H. P. Vevelstad and Aurora Nickel Company, a corporation, Appellant Pape hav-

ing died about April 25, 1956, that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, respectfully shows:

**OPINIONS.**

United States Court of Appeals for the Ninth Circuit, January 13, 1956, unreported (R. 723) (Appendix i).

United States Court of Appeals for the Ninth Circuit, denying petition for rehearing, March 5, 1956, unreported (R. 734) (Appendix xviii).

District Court for the Territory of Alaska, First Division, 119 F. Supp. 93, 14 Alaska Reports 557 (R. 97-106, USCA 9, No. 14,431).

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**GROUNDS ON WHICH JURISDICTION IS INVOKED.**

This Honorable Court's jurisdiction is invoked because the United States Court of Appeals for the Ninth Circuit in affirming the judgment of the District Court for the District of Alaska, Division Number One,

(a) indulged in a wholly strained and hampering construction of Rules 7(a), 8(a) and (d), 13(a), 26(d)(3)(2), 52, 53(e)(2), and 59(a), Federal Rules of Civil Procedure, promulgated by this Court's Advisory Committee which it appointed under Section 2, Act of June 19, 1934, c. 641, 48 Stat. 1064, which rules were made effective in Alaska by Public Law 175, Act of Congress approved July 18, 1949, c. 343, p. 2,

63 Stat. 646, 28 USC 2072, whereas those Rules are intended to be and should be liberally construed to protect litigants' rights. Such illiberal construction, if not overthrown, will eventually become an authority, certainly in the Ninth Circuit, to destroy the actual intendment of those rules.

(b) imposed an illegal limitation upon an original locator of a lode mining claim in holding that, under the Act of Congress of May 31, 1938, 52 Stat. 588, Title 48 USCA 381-384, as supplemented by Sections 47-3-31, 47-3-33, and 47-3-34, Alaska Compiled Laws Annotated 1949, he cannot question the sufficiency of the lode mining claim location made subsequently by another, but that the latter can question the sufficiency of the former's location, thereby unjustly discriminating against the original locator in litigation between him and the subsequent locator contrary to the U. S. Mining Laws.

(c) held that a self-admitted, volunteered admission of Canadian citizenship did not disqualify that Canadian citizen from locating a lode mining claim in Alaska despite neither Section 13, Act of Congress of May 14, 1898, 30 Stat. 415; 48 USC 392; Section 47-3-9, ACLA 1949, nor Section 112, Department of Interior's Circular No. 430, U. S. Mining Laws, approved April 11, 1922, were before this Honorable Court when it rendered its decision in *McKinley Creek Mining Company v. Alaska Mining Co.,* 183 U.S. 563, 571. This holding is of great importance to the Alaska mining industry, because, under it, although under Section 13, Act of May 14, 1898, supra,

native born Canadian citizens are limited to such mining rights in Alaska as are reciprocally accorded to American citizens in British Columbia and the Northwest Territory, which reciprocity is not extended, according to the Department of Interior's Circular No. 430, supra, to American citizens by Canada, a self-admitted Canadian citizen, whether native born or not, can establish title to his self located mining claim in Alaska as against an American citizen who did not originate the attack upon the Canadian locator's citizenship.

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**JUDGMENTS AND ORDER BELOW.**

The judgment sought to be reviewed was entered January 13, 1956 (R. 733), affirming the trial Court's judgment entered April 24, 1954 (R. 119).

The order denying petition for rehearing was entered March 5, 1956 (R. 734).

**STATEMENT OF JURISDICTION.**

Section 1254, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 928, provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."
>
> "* * *"

Section 1291, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 929, as amended Oct. 31, 1951, c. 655, §48, 65 Stat. 726, provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

This case does not involve a decision invalidating an Act of Congress, nor any order by a three judge Court; hence, no direct appeal could have been taken under either Section 1252 or Section 1253, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 926.

The Federal Rules of Civil Procedure were made effective in Alaska by Public Law 175, Act of Congress approved July 18, 1949, c. 343 ¶2, 63 Stat. 646, 28 USC 2072.

**QUESTIONS PRESENTED.**

1. Does failure to Reply to a Counterclaim, denominated as such under Rule 7(a), Federal Rules of Civil Procedure, hereinafter designated as FRCP, constitute an admission of the Counterclaim's averments other than those as to the amount of damage under Rule 8(d), FRCP, even though the pleaded Counterclaim, as matter of inducement, incorporated therein another Defense pleaded in the Answer.

2. Does Rule 26(d)(3)(2), FRCP, permit the use by two Defendants of a deposition taken by Plaintiff of a third Defendant, even if for discovery purposes only, in the absence of the third Defendant at a greater distance than 100 miles from the place of trial or hearing or out of the United States when it appears that the third Defendant's absence was not obtained by the other two Defendants.

3. Must a trial Court exercise a sound discretion under Rules 52 and 53, FRCP, in denying a party's request to reserve decision until further evidence may be received from a witness, whose absence was not obtained by the requesting party.

4. Must a trial Court exercise a sound discretion under Rule 59(a), FRCP, in denying a motion for a new trial which is supported by the affidavits of two uncontradicted witnesses disclosing newly discovered evidence which well might have changed the result of the trial.

5. Does the Act of Congress of May 31, 1938, 52 Stat. 588, Title 48 USCA 381-384, as supplemented by Sections 47-3-31, 47-3-33, and 47-3-34, Alaska Com-

piled Laws Annotated 1949, relegate only to a subsequent locator the right to object to the insufficiency of another person's lode mining claim locations in Alaska.

6. Under this Honorable Court's decision in *McKinley Creek Mining Company v. Alaska Mining Company,* 183 U.S. 563, 571, is a person, who volunteers under oath, without documentary proof and without stating whether native born or naturalized, that he is a Canadian citizen, qualified to locate lode mining claims in Alaska and to maintain a suit to quiet title thereto as against American citizen locators of lode mining claims in Alaska, in view of Section 13, Act of May 14, 1898, and the U. S. Department of Interior's Circular 430, Section 112.

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**RULES, STATUTES AND REGULATIONS INVOLVED.**

Federal Rules of Civil Procedure, Rule 7(a), 8(a), 8(d), 9(g), 10(c), 13(a), 26(d)(3)(2), 45(e)(1), 52, 53(e)(2), 59(a), and 60(b), all of which are set forth in the Appendix, pp. xxi-xxvi.

Section 13, Act of Congress of May 14, 1898, 30 Stat. 415, 48 USC 392; CLA 1933, Section 353; Section 47-3-9, ACLA 1949 (Appendix, p. xxvii).

Act of Congress of June 6, 1900, 31 Stat. 410-411; Section 56-1-91 ACLA 1949 (Appendix, p. xxvii).

Section 1, Act of Congress of February 25, 1920, c. 8, 41 Stat. 437; 30 USC 22; Section 47-3-1, ACLA 1949 (Appendix, p. xxviii).

Act of Congress of June 6, 1900, c. 786, Section 26, 31 Stat. 329; amended by Act of May 31, 1938, 52 Stat. 588; amended by Act of August 8, 1947, c. 514, Section 1, 61 Stat. 916; 48 USCA 381; Section 47-3-21, ACLA 1949 (Appendix, p. xxviii).

Section 47-3-31, ACLA 1949 (Appendix, p. xxx).

Section 47-3-33, ACLA 1949 (Appendix, p. xxxi).

Section 47-3-34, ACLA 1949 (Appendix, p. xxxii).

United States Department of Interior Circular No. 430, Section 112, U.S. Mining Laws, approved April 11, 1922 (Appendix, p. xxxiii).

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**STATEMENT OF CASE.**

This is an action to quiet title brought by Respondent Flynn under Section 56-1-91, ACLA 1949, Act of Congress of June 6, 1900, 31 Stat. 410-411 (App. p. xxvii) to 102 mining claims on Yakobi Island, Alaska, against Petitioners who answered (PR 67-75) setting up four defenses with a Counterclaim denominated as such (PR 73), viz.: First, Respondent's pleading failed to state a claim upon which relief could be granted; Second, Respondent's 102 pretended mining claims constituted a cloud upon Petitioners' 27 mining claims which they owned and of which they held prior right and possession; Respondent's said claims were based upon pretended mining claims locations; Third, Petitioner Aurora Nickel Company's ownership of 27 mining claims based upon prior location on public lands, with discoveries, recording of certificates of

location with the Sitka Recorder within whose precinct the claims are located; doing of the necessary annual assessment work, and recording with Sitka Recorder affidavits of doing the assessment work; Petitioners Vevelstad and Pape financial interest in the claims through Petitioner Aurora Nickel Company; Respondent's pretended 102 claims, in so far as in conflict with Petitioners' 27 claims, were located subsequent in time to Petitioners' locations and possessions; no discoveries made by Respondent, or, if made, Respondent failed to post sign or notice at point of discovery or adjacent thereto, or name of locator, date of location, number f feet claimed along the vein on each way from point of discovery, width on each side of center of lode, and did not erect required posts or monuments and did not cut out, blaze or mark boundary lines so they could be readily traced, and did not actually locate upon the ground Respondent's claims upon any vein or lode; that neither pretended boundaries or pretended courses of Respondent's 102 pretended claims, as he pretended to locate and lay them out upon the ground, accord with or conform to either the pretended locations notices which Respondent recorded with Sitka Recorder or with descriptions as pleaded in his Amended Complaint, nor did Respondent file for record, within 90 days, certificates of location; Petitioners entitled to exclusive right of possession and enjoyment of their 27 claims; Respondent's locations and recording are clouds on Petitioner's title. Fourth Defense, which was denominated as a Counterclaim in accordance with Rule 7(a), FRCP; after inducement allega-

tions, Respondent, sometime in October and November, 1952, then knowing that Petitioners were the owners and possessors of their 27 lode mining claims and were negotiating for the sale thereof and the extraction, mining and sale of the valuable minerals therein, wilfully and maliciously trespassed thereupon by the pretended locations, the location notices whereof Respondent recorded with the Sitka Recorder, of Respondent's pretended 102 lode mining claims, and blanketed the entire area embraced within Petitioners' 27 lode mining claims for the purpose of preventing Petitioners not only from excavating and mining or arranging for the excavating and mining of the valuable minerals in Petitioners' mining claims but also from selling them and the valuable mineral therein and for the further purpose of thereby enabling Respondent, on behalf of unknown persons represented by him, to prevent nickel in Alaska from reaching the market to compete with nickel mined in other parts of the world, particularly in Canada (PR 73-74).

Respondent by his said actions prevented Petitioners from so excavating, mining and selling their 27 mining claims and the valuable minerals therein, and thereby damaged Petitioners in actual loss of profits that they would otherwise have made of not less than five million dollars and the further sum of fifteen million dollars by way of exemplary damages (PR 74).

Petitioners prayed their title to their 27 claims might be quieted as against Respondent and for judg-

ment against Petitioner for $5,000,000 actual damages, and $15,000,000 exemplary damages.

Respondent served and filed no Reply.

Trial was had in Juneau in December, 1953, in the absence of Appellant Pape and over the objections of Petitioners Vevelstad and Aurora Nickel Company (R. 158), who had not procured Pape's absence (R. 342), who the trial Court held was a material witness (R. 135-136), but whose deposition was denied admission upon Petitioners' offer (R. 340) because the trial Court held it was taken by Respondent for discovery purposes only (R. 99).

Respondent on his own behalf, in response to his own counsel's question, voluntarily admitted that he was a Canadian citizen (R. 265).

Before the trial Court rendered its decision, Petitioners requested that decision be deferred until Pape's evidence could be obtained (R. 95), which request was refused.

The trial Court denied (R. 118) Petitioners' motion for new trial which was supported by an affidavit of a witness showing newly discovered evidence (R. 116-118), which might have changed the result of the trial.

The trial Court held that the allegations of Petitioners' compulsory counterclaim, which was denominated as a Counterclaim (R. 73-74), needed no reply and were not admitted because by way of inducement Petitioners by reference had made their Third Defense a part thereof (R. 105).

The District Court for the Territory of Alaska rendered judgment against Petitioners and in favor of Respondent as to 45 of the latter's pretended claims on April 24, 1954 (PR 119-122), having previously on March 9, 1954, rendered its Opinion (PR 97-106).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, before whom the appeal was argued on April 19, 1955, and which rendered its Opinion on January 13, 1956, sustaining the lower Court. Unreported (R. 723; Appendix, p. i).

A rehearing was denied March 5, 1956. Unreported (R. 734; Appendix, p. xviii).

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## ARGUMENT.

### QUESTION 1.

**DOES FAILURE TO REPLY TO A COUNTERCLAIM, DENOMINATED AS SUCH UNDER RULE 7(a), FEDERAL RULES OF CIVIL PROCEDURE, HEREINAFTER DESIGNATED AS FRCP, CONSTITUTE AN ADMISSION OF THE COUNTERCLAIM'S AVERMENTS OTHER THAN THOSE AS TO THE AMOUNT OF DAMAGE UNDER RULE 8(d), FRCP, EVEN THOUGH THE PLEADED COUNTERCLAIM, AS MATTER OF INDUCEMENT, BY REFERENCE INCLUDED THEREIN ANOTHER DEFENSE PLEADED IN THE ANSWER?**

Petitioners in their answer set forth a counterclaim under Rule 8(a) (Appendix, p. xxi), which they therein denominated (PR 73-74) as such under Rule 7(a) (Appendix, p. xxi), which Rule required a reply thereto.

Respondent served and filed no Reply, nor any motion against it.

Petitioners' Counterclaim is a Compulsory Counterclaim under Rule 13(a) (Appendix, p. xxii) and arose out of the transaction or occurrence that is the subject matter of Respondent's claim (Amended Complaint, PR 53-63), and had they not pleaded it herein they would have been precluded from doing so in an independent action.

*Lesnik v. Public Industrials Corporation,* 144 F2d 968 (CCA NY 1944);

*Penn. R. Co. v. Musante-Hillips, Inc.,* 42 F Supp. 340, (DC Cal. 1941).

Petitioners submit that their Counterclaim denominated as such required a Reply, Rule 7(a), supra, or else stands admitted under Rule 8(d) (Appendix, p. xxi).

*U. S. v. Hole,* 38 F Supp. 600 (DC Mont. 1941);

*Porter v. Theo J. Ely Mfg. Co.,* 5 FRD 317, (DC Pa. 1946);

*Sun-Maid, etc., Assn. v. Neustadter Bros.,* 115 F2d 126, 127 (CCA Cal.);

*Peters & Russell v. Dorfman,* 188 F2d 711, 713, (USCA 7).

The trial Court seemingly would have so held had he not criticized the form of the plea (PR 105). Petitioners submit that their Counterclaim was well pleaded, and that Rule 9(g), i.e.: "Special damage. When items of special damage are claimed, they shall be specifically stated," required them to plead their special damages, and that under Rule 10(c), i.e.: "Adoption by Reference Exhibits. Statements in a pleading may be adopted by reference in a different

part of the same pleading or in another pleading or in any motion . . .", they properly incorporated therein by reference (PR 73) the allegations in their Third Defense (PR 68-73) which were necessary allegations showing the foundation of their claim to special and exemplary damages, and that their Counterclaim (PR 73-74), assuming without conceding that it was prolix or contained unnecessary allegations, should have been construed in the spirit of Rule 8(f), i.e.: "Construction of pleadings. All pleadings shall be so construed as to do substantial justice," instead of being entirely discarded by the Court of its own volition.

*Hollander v. Davis,* 120 F2d 131 (CCA, Fla.);
*Gribble v. Ditto,* 119 F2d 278 (CCA, NY);
*Bachman v. Seaboard Air Lines R. Co.,* 80 F Supp. 976 (DC, SC);
*Perry v. Creech Coal Co.,* 55 F Supp. 998 (DC, Ky.).

Petitioners proved their damages by Vevelstad (PR 544-550). Respondent adduced no evidence whatsoever to rebut Vevelstad's evidence in that respect.

Petitioners urge that their testimony as to the damages they suffered by reason of Appellee's acts was not wholly frivolous and wanting in substance. We submit that Petitioner Vevelstad's testimony was neither frivolous nor insubstantial. He stated that the United States Government through the National Production Authority on October 14, 1952, was ready to finance a plant and that they were waiting now to move in, and that under that Authority he could have put in a plant to mine and concentrate the ore, which

would have been shipped south in the form of concentrates, and that he had people ready to proceed under the National Certificate of Authority but that Respondent's actions had clouded Petitioners' title and the people quit, and that the plant would earn annually $60,000,000 per year, of which his share alone would be around $8,000,000 annually in addition to 25% of the profits and that he was dealing with one of the biggest engineering firms in the United States and that he had an agreement in October, 1952; also that he based his exemplary damages upon the principle that punitive damages for violations of the Anti-Trust Law were computed at three times the actual damages (PR 545-550), also that on July 10, 1952, an engineer representing buyers investigated the property (PR 573).

None of this testimony was contradicted. It was ample and good proof of the amount of damages in accordance with Rule 8(d) FRCP, which had not even been denied by pleading.

All other averments of the Counterclaim were admitted under Rule 8(d), FRCP.

QUESTION 2.

**DOES RULE 26(d)(3)(2), FRCP, PERMIT THE USE BY TWO DEFENDANTS OF A DEPOSITION TAKEN BY PLAINTIFF OF A THIRD DEFENDANT, EVEN IF FOR DISCOVERY PURPOSES ONLY, IN THE ABSENCE OF THE THIRD DEFENDANT AT A GREATER DISTANCE THAN 100 MILES FROM THE PLACE OF TRIAL OR HEARING OR OUT OF THE UNITED STATES WHEN IT APPEARS THAT THE THIRD DEFENDANT'S ABSENCE WAS NOT OBTAINED BY THE OTHER TWO DEFENDANTS?**

Petitioners offered in evidence (PR 340) Pape's deposition taken by Respondent in Seattle in September, 1953 (PR 343-432), which the Court tentatively admitted (PR 342-343), but later rejected on the ground it was taken by Respondent "for discovery purposes only" (PR 99). Respondent, in resisting a continuance, suggested Petitioners' use of Pape's deposition (PR 147), and, Petitioners contend, did not object, at least not properly, to its admission (PR 340-342).

It was clearly admissible under Rule 26(d)(3)(2) FRCP, i.e.:

> "(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was obtained by the party offering the deposition. . . ."

The Court made no finding other than Pape's absence was inexcusable (PR 99). Pape was more than 100 miles distant from Juneau, the place of trial, and

outside the United States, nor had Petitioners Vevelstad and Aurora Nickel Company procured his absence (PR 82-88). They could not subpoena him under Rule 45(e)(1), FRCP, i.e.:

> ". . . A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of hearing or trial specified in the subpoena; . . ."

The Court said Pape was a material witness (PR 135-136). It did not say his deposition did not adduce material evidence (PR 99); in fact, it was material, inter alia: He worked on Chicagof Nickel Company claims in Bohemia Basin about 3 months in 1931 (PR 346-348), which showed his familiarity with ground and discoveries. Velvelstad said the Chicagof Nickel Company first held these claims from 1925 to 1934 (PR 551). Pape said he went to the upper camp (in Bohemia Basin) on September 25, 1950 (PR 375), returning to the Beach Camp noon October 2, 1950 (PR 376; 354-355), refuting Hildre's first statement that Pape left Bohemia Basin October 1, 1950 (PR 599) and agreeing with Hildre's second statement Pape left Bohemia Basin October 2, 1950 (PR 605). Pape's location notices, Exhibit E, bear date October 1, 1950. Pape testified to the extent of the 1952 assessment work, including work on trails, which he did (PR 356-358; 381-396) and for 1953 (PR 396-431), refuting Klein's opinion as to the small extent of trail work (PR 686); also (PR 405-414) refuting Harri-

gan (PR 653-669), and supported his proofs of labor, Exhibits F and H. His deposition thus also refuted the Court's finding that Petitioners' assessment work was done outside the claims purportedly for the benefit of non-contiguous claim (PR 104).

Pape's deposition was admissible under authority of

Moore's Federal Practice, Vol. 4, 1196,

which epitomizes in footnote 14, in the following language:

> "The majority opinion indulges in a wholly strained and hampering construction of Rule 26(d)(3) . . . Professor Moore shows that a party may properly take advantage of clause 2 without necessarily being charged with procuring his own absence. 2 Moore's Federal Practice, 2460-2462, 2492,"

Judge Clark's dissent in

*Arnstein v. Porter,* 154 F2d 464, 478 (CCA2d 1946).

See also:

*Weiss v. Weinter,* 10 FRD 387, 389;

*Frederick v. Yellow Cab Co.,* (USCA3d 1952), 200 F2d 483.

Moreover, Respondent had the duty to show that Pape was available.

*Seiden v. Concordia Fire Insurance Co.,* 49 F2d 474 (DCSD NY).

Respondent made no such showing, admitting he had no evidence that Petitioners Vevelstad and Aurora

Nickel Company had procured Pape's absence, and stipulating that Vevelstad would testify they had not (PR 342).

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**QUESTION 3.**

**MUST A TRIAL COURT EXERCISE A SOUND DISCRETION UNDER RULES 52 AND 53, FRCP, IN DENYING A PARTY'S REQUEST TO RESERVE DECISION UNTIL FURTHER EVIDENCE MAY BE RECEIVED FROM A WITNESS, WHOSE ABSENCE WAS NOT OBTAINED BY THE REQUESTING PARTY?**

The trial Court admitted that it was convinced Pape was a material witness (PR 135-136), even Respondent admitted Pape was an important witness (PR 147). It scarcely seems necessary to point out to what material evidence he testified in his deposition, Exhibit D (PR 343-431), other than he was in Bohemia Basin from September 24 to October 2, 1950 (PR 354-355; 373-376) and did the assessment work in 1952 (PR 382) and in 1953 (PR 427-431), and contradicted Ward's affidavit that Respondent had overwhelming proof that Pape did not locate any mining claims in Bohemia Basin in October 1950, or prior to Respondent's locations (PR 80). Pape's affidavit (PR 109-112), which the Court ignored in denying (PR 118) Petitioners' Motion for New Trial (PR 107-109), also clearly shows the materiality and importance of his evidence.

Petitioners respectfully submit the trial Court arbitrarily and capriciously exercised its discretion in rejecting Petitioners' request to reserve its decision un-

til Pape's evidence could be adduced (PR 95) and that as a court of equity it had inherent power to do so. Moreover, Rule 52, FRCP (Appendix, p. xxiv), undoubtedly empowered it to do so.

*Hernberg v. Tipton,* CCA, Ill. 1943, 133 F2d 67, 69.

Rule 53(e)(2) in regard to Masters provides: "In non jury actions . . . The Court after hearing . . . may receive further evidence. . . ."

If a court may receive further evidence after a masters' report, surely a court of equity may do so after conducting its own trial or hearing.

The trial Court recognized this power in

*George v. Lyons,* 110 F Supp. 711, 713, 14 Alaska 241, 244.

Also, see:

*Eastern Airlines v. U. S.,* 110 F. Supp. 491;
*Rue v. Feuz Constr. Co.,* 103 F. Supp. 499.

Without reiteration of the record's clarity that Petitioners Vevelstad and Aurora Nickel Company were sincerely and totally surprised at being forced to trial in Pape's absence (PR 88; 157), they submit they were prejudiced thereby because they relied upon him to prove that he made his locations in October, 1950 (PR 111), and the extent and nature of the 1952 assessment work (PR 355-358; 382-396) and to corroborate his proofs of labor, Exhibits F and H, and to refute (PR 109-113) Ward's prejudicial statements (PR 78-81) and such of them as might be put in evidence.

Petitioners had no opportunity here to adduce their requested additional evidence as in:

*Massachusetts Mut. L. I. Co. v. Murphy,* 45 F Supp. 826, aff. 137 F2d 154; Cer. Den. 320 US 795.

The converse rule that a decision will not be overturned on appeal except for clear abuse of discretion, plainly indicates that it will be overturned for clear abuse of discretion where request is made to delay decision until additional evidence may be received.

*Blytheville Cotton Oil Co. v. Kurn,* 155 F2d 467 (CCA Tenn.);

*Chemical Delinting Co. v. Jackson,* 193 F2d 123 (CA Tex.).

Here, although Appellant Pape was absent without Petitioners Vevelstad and Aurora Nickel Company's fault, and despite his deposition was denied admission when they offered it, the trial Court refused to defer decision until his evidence could be obtained.

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**QUESTION 4.**

**MUST A TRIAL COURT EXERCISE A SOUND DISCRETION UNDER RULE 59(a), FRCP, IN DENYING A MOTION FOR A NEW TRIAL WHICH IS SUPPORTED BY THE AFFIDAVITS OF TWO UNCONTRADICTED WITNESSES DISCLOSING NEWLY DISCOVERED EVIDENCE WHICH MIGHT WELL HAVE CHANGED THE RESULT OF THE TRIAL?**

Rule 59(a), FRCP, provides:

"New trials; Amendment of Judgments. (a) Grounds. A new trial may be granted to all or any

> of the parties and on all or part of the issues (1) * * *; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the Courts of the United States."

Referring to the ground of new trial on the basis of newly discovered evidence, the Notes of Advisory Committee on Amendments to Rules, 28 USCA Rules 52 to end, at page 270, Rules of Civil Procedure, says:

> "This ground remains, however, as a basis for a motion of new trial served not later than 10 days after the entry of judgment. See also rule 60 (b)."

Emphasis is laid upon the meritoriousness of this ground by Rule 60(b) further providing:

> "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) * * *; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); * * *."

Petitioners' Motion for New Trial (PR 107-109) was supported by Pape's affidavit (PR 109-112) stating he located his claims in October, 1950, left Bohemia Basin on October 2, 1950, was anxious to be a witness at the trial, but was kept from it by his government employment, leaving for Korea on Novem-

ber 26, 1953, and refuted (PR 109-112) Ward's affidavit (PR 78-81), which was Respondent's only verified evidence opposing Petitioners' motion for continuance of trial (PR 76-78), and Brown's affidavit (PR 113-114), wherein he corroborated Pape's deposition, which the Court rejected (PR 99), that he left Yakobi Island around noon October 2, 1950 (PR 355; 376), and Breseman's (PR 114) that he worked with Pape from June 6 to 11, 1953, on the Hope and Rita claims about 2½ miles up Bohemia Valley from the main basin camp on Lisianski Strait, and saw Johnson and O'Donnell only once during that time, and Breseman's (PR 116-118), which was newly discovered evidence, as stated therein (PR 116), and said he had worked for Respondent and with Stahl in Bohemia Basin in November and December, 1953, and had seen no indications of any blazed boundaries, monuments, or stakes of Respondent's claims, while checking the Hope claims boundaries which were blazed and corners and discovery posts in place and visible, and he and Stahl walked a distance of some 50 to 200 yards, after checking the Hope claims, before coming to any of Respondent's claims, and Stahl told him that he, Stahl, had relocated and restaked the key claims so he could file location notices thereof should the Court hold both Respondent's and Petitioners' claims were invalid, and Stahl also told him he had never seen any claims better marked than Pape's claims (PR 116-118). Johnson had said Stahl had measured the greatest share of the claims, and Breseman helped Stahl, and Stahl and Breseman had

gone over some of the llines as a separate party (PR 200-201). Appellee did not call Stahl as a witness. Stahl was the engineer in charge of the survey party upon Yakobi Island im September, 1953, and was a partner of the Americam Engineering Company which hired Respondent's wiitness Johnson (PR 196-199).

No opposing affidavitts were filed.

Breseman's affidavit (PR 116-118) was newly discovered evidence competent and relevant to and supported the issue of Petitioners' Hope claims boundaries having been properly blazed with corners and discovery posts in place and that Respondent's claims did not have blazed boundaries, monuments or stakes. Petitioners could not have discovered Breseman's evidence in time for the trial, which commenced, over Petitioners' objections on December 15, 1953 (PR 153-158), very shortly after Breseman acquired the information which he set forth in his affidavit because he said he acquired it during a few days in the latter part of November and the early part of December 1953 (PR 116). Respondent did not produce Breseman as a witness. He resided in Pelican. The record is bare of any evidence that he was in Juneau in the meantime at or prior to the trial. He stated he gave the information to Petitioner Vevelstad after the trial (PR 116).

Petitioners specifically called it to the Court's attention as newly discovered evidence in their argument (PR 711) on their Motion for New Trial (PR 107-109).

Such Breseman testimony might well have changed the result of the trial.

*Tracy v. Terminal R., etc.,* 170 F2d 635 (CA, Mo.);

*Murdock v. U. S.,* 160 F2d 358 (CCA, Ark.);

*Sulzbacher v. Continental Casualty Co.,* 88 F 2d 122.

The trial Court's disregard of Breseman's (PR 116-117), Brown's (PR 113-114), and Petitioner Pape's affidavits (PR 109-112) was a clear abuse of discretion, and entirely ignored the fact that Breseman's was plainly newly discovered evidence which might well have changed the result of the trial.

It was not merely cumulative, nor such as to do no more than discredit, contradict, or impeach a witness.

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**QUESTION 5.**

**DOES THE ACT OF CONGRESS OF MAY 31, 1938, 52 STAT. 588 (ORIGINALLY ACT OF CONGRESS OF JUNE 6, 1900, c. 786, SECTION 26, 31 STAT. 329), AS AMENDED BY ACT OF AUGUST 8, 1947, c. 514, SECTION 1, 61 STAT. 916, SECTION 47-3-21, ACLA 1949, TITLE 48 USCA 381-384, AS SUPPLEMENTED BY SECTIONS 47-3-31, 47-3-33, AND 47-3-34, ALASKA COMPILED LAWS ANNOTATED 1949, RELEGATE ONLY TO A SUBSEQUENT LOCATOR THE RIGHT TO OBJECT TO THE INSUFFICIENCY OF ANOTHER PERSON'S LODE MINING CLAIM LOCATIONS IN ALASKA?**

The mining laws of the United States supplemented by Territorial Laws govern the claims involved herein.

*Lowe v. U. S. Smelting & Refining Co.,* 175 F 2d 486, 12 Alaska 423, 429; 70 S.Ct. 493.

The trial Court held that Petitioners could not object to the insufficiency of the descriptions of Respondent's lode claim locations upon the ground that Petitioners were not subsequent locators. (Op., R. 105).

The trial Court in so holding relied upon

*J. E. Riley Inv. Co. v. Sakow,* 9 Alaska 427, 434, 442, 110 F 2d 34,

which was based upon Chapter 10, Session Laws of Alaska 1915, which was repealed by Chapter 64, Session Laws of Alaska 1931. Petitioners submit that the lower Court therein did not hold that under that act abandonment or forfeiture could be asserted only by a subsequent locator or by a relocator but simply said that the 1915 legislature made abandonment nothing more than a defense. The Appellate Court in 110 F2d 345 did not pass upon this point.

Furthermore, a placer claim was involved in the *Riley v. Sakow* case, whereas here lode claims are involved. That decision was based upon Section 2 of Chapter 10, SLA 1915, which pertained to placer claims only. Sections 10 to 15 of that act pertaining to lode claims did not contain the same provisions as those pertaining to placer claims, but Section 15 did provide that a locator or claimant might amend his location, and Section 21 specifically provided that, should the locator fail to comply with any of the provisions of Sections 10 to 21 of the act, the burden of proof would be upon him to show compliance with the provisions of said sections.

The burden is on plaintiff in a suit to quiet title under Section 56-1-91, ACLA 1949, to succeed on the strength of his own title.

*Ripinski v. Hinchman* (USCA 9) 181 F. 786, 3 AFR 496.

Patton on Titles announces the same rule: "Plaintiff can recover only on the strength of his own title." p. 917.

*Anderson v. Anvil Hydraulic Co.*, 3 Alaska 496.

The burden of proof falls under the well known rule, i.e.:

> "The complainant in any action to quiet title, to remove a cloud thereon, or to determine an adverse claim has the burden of proof as to all issues arising upon essential allegations of the complaint. He must prove title in himself if the answer denies his title or *if the defendant claims title adversely.* He must also assume the burden of showing compliance with conditions precedent to his right to relief." (Emphasis supplied.)
>
> Quieting Title, 44 Am. Jur., Sec. 83, pp. 67-68.

The limitation that only a subsequent locator can object to the insufficiency of another person's lode mining claim location in Alaska is not authorized by the Act of Congress of May 31, 1938, as amended by the Act of August 8, 1947 (Appendix, p. xvii), or as supplemented by Sections 47-3-31, 47-3-33, 47-3-34, ACLA 1949 (Appendix, p. xxx).

The construction of those statutes to mean that an original locator can't attack the insufficiency of a

subsequent locator's lode mining location in Alaska, but that the latter can attack the insufficiency of the former's, relieves a plaintiff, who is a subsequent locator, from the burden of proof or at least greatly lessens his burden of proof under the aforesaid rule that a plaintiff, in a suit to quiet title, must rely upon the strength of his own title.

The original locator litigant receives no such advantage.

That construction gives to a party litigant, whether plaintiff or defendant, who is a subsequent locator of a lode mining claim in Alaska, the advantage of having the insufficiency of his location free from attack by the other party litigant, whether defendant or plaintiff, who is an original locator; whereas the original locator, whether plaintiff or defendant, may have his location attacked for insufficiency by the subsequent locator.

Here, Respondent, the subsequent locator, was permitted to attack the sufficiency of Petitioners', the original locators', locations, but Petitioners were denied the right to attack for insufficiency the Respondent's locations.

The trial Court itself found there were defects in Respondent's locations (Op., R. 105). The respondent took no appeal.

The United States Court of Appeals for the Ninth Circuit, despite Respondent's failure to appeal, in its sustaining opinion held that Respondent's locations were sufficient, thereby actually reversing the trial

Court's finding in that respect, and seemingly thereby avoiding ruling whether or not the trial Court was correct or in error in holding that under the above quoted statutes an original locator cannot object to the sufficiency of a subsequent locator's locations, but that the latter can object to the insufficiency of the former's.

Moreover, the fact is that in June, 1953, as shown by Petitioners' Exhibit J, the Petitioner Aurora Nickel Company made amended Certificates of Location of the Rita 1, Rita 2, Rita 3, and Rita 4, Doris 1 and Doris 2, and Hope 1, Hope 2, Hope 3, Hope 4, Hope 5, Hope 6, Hope 7, Hope 8, Hope 9, Hope 10, Hope 11, and Hope 12, Sverre, and Sverre No. 2, and located Sverre No. 3 (PR 544) constituting 21 of the 27 claims owned by Petitioner Aurora Nickel Company.

Furthermore, that holding was made although the trial Court held that the locations of Petitioners' three Beach claims were sufficient (Op., R. 101).

QUESTION 6.

**UNDER THIS HONORABLE COURT'S DECISION IN McKINLEY CREEK MINING COMPANY v. ALASKA MINING COMPANY, 183 U.S. 563, 571, IS A PERSON, WHO VOLUNTEERS UNDER OATH, WITHOUT DOCUMENTARY PROOF AND WITHOUT STATING WHETHER NATIVE BORN OR NATURALIZED, THAT HE IS A CANADIAN CITIZEN, QUALIFIED TO LOCATE LODE MINING CLAIMS IN ALASKA AND TO MAINTAIN A SUIT TO QUIET TITLE THERETO AS AGAINST AMERICAN CITIZEN LOCATORS OF LODE MINING CLAIMS IN ALASKA, IN VIEW OF SECTION 13, ACT OF MAY 14, 1898, AND THE UNITED STATES DEPARTMENT OF INTERIOR'S CIRCULAR 430, SECTION 112?**

Petitioners urge that a different situation is here presented than was before this Honorable Court in *McKinley Creek Mining Company v. Alaska Mining Co.*, 183 U.S. 563, 571.

There the defendants attacked the plaintiffs' qualifications to locate mining claims in Alaska because they were aliens.

Here Petitioners did not attack Respondent's qualification as an alien to locate mining claims.

In proof of the strength of his own title, apparently in recognition of the rule that he had to rely on his own title, he testified in response to a question of his own counsel, that he was a Canadian citizen (PR 265). He offered no documentary proof thereof, nor did he state whether a native-born or naturalized.

The laws of the United States relating to mining claims, mineral locations, and rights incident thereto were extended to the Territory of Alaska by the amendatory Act of Congress of May 31, 1938, 31 Stat. 329; CLA 1933, Section 321; Am 52 Stat. 588; Act of

August 8, 1947, 61 Stat. 916; 48 USC Section 381; Section 47-3-21, ACLA 1949.

The United States Court of Appeals for the Ninth Circuit held that this amendatory Act of Congress of May 31, 1938, extended all the United States mining laws to Alaska, including the doctrine of resumption of assessment work.

> *Lowe v. U. S. Smelting etc. Co.,* 12 Alaska 423, 429, 175 F2d 486.

This Honorable Court in granting a new trial did not pass upon that particular point. Ibid, 70 S.Ct. 493.

United States mineral lands are free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become citizens under regulations prescribed by law.

Section 47-3-1, ACLA 1949; 41 Stat. 437; CLA 1933, Section 322; 30 USC 22; Section 1, Act of Congress of February 25, 1920, c. 8 (Appendix, p. xxviii).

While Congress by Section 13 of its Act of May 14, 1898, 30 Stat. 415; 48 USC 392; CLA 1933, Section 353; 47-3-9 ACLA 1949 (Appendix, p. xxvii), extended under certain conditions reciprocal mining rights in Alaska to native born Canadian citizens, the United States Department of Interior in 1922 held that reciprocity had never become operative because Canada had not granted similar reciprocal mining rights to American citizens in British Columbia and the Northwest Territory.

> U.S. Department of Interior Circular No. 430, U.S. Mining Laws, approved April 11, 1922 (Appendix, p. xxxiii).

Respondent of his own volition and not at Petitioners' behest disclosed that his locations were void because he was not an American citizen nor had he applied to become a citizen, and he was not qualified to locate them as a Canadian citizen, even if he be native-born, because Canada has not accorded reciprocal rights to American citizens to locate mining claims in British Columbia or the Northwest Territory.

Respondent instituted his own office found, Petitioners did not do so, and thereby admitted that he had no right to locate mining claims in Alaska.

Here, the situation is also different than in *Manuel v. Wulff,* 152 U.S. 505, where the alien became a citizen prior to judgment.

The instant situation is akin to a person, claiming the right to an office, but in his information admitting facts that show he is not entitled to the office. Undoubtedly he could not recover.

While the Act of Congress of May 14, 1898, including the quoted Section 13 thereof, was in effect when this Honorable Court decided *McKinley Creek Mining Company v. American Mining Company,* supra, neither that Act nor that Section thereof is mentioned or construed in that reported decision.

On May 31, 1938, when Congress extended all of the United States mining laws to Alaska, it undoubtedly knew of the official position taken by the United States Department of Interior by its aforesaid Circular No. 430 that no reciprocal rights existed between American and Canadian citizens as to the location of mining claims in each other's countries.

But, Congress added nothing to Section 13.

Hence, Congress undoubtedly approved the Department of the Interior's pronouncement that Canadian citizens had no reciprocal rights to locate mining claims in Alaska.

Moreover, Section 13, if in effect, is a statute of limitations and specifically provides that no Canadian citizen can take by purchase mining claims in Alaska unless he be a native-born citizen of Canada and then only shall he be accorded the same mining rights and privileges in Alaska that are accorded to citizens of the United States in British Columbia and the former Northwest Territory where the same mining rights and privileges are not accorded to American citizens.

Respondent volunteered that he is not entitled to take mining claims in Alaska by purchase; hence, he cannot maintain this suit to quiet title to mining claims located by him, because under the well known rule he was obliged to rely on the strength of his own title and he voluntarily testified that he had no title.

Petitioners submit that the questions stated in the Petition should be settled by this Court and a writ of certiorari to that end should issue.

Dated, Juneau, Alaska,
May 25, 1956.

Respectfully,
R. E. ROBERTSON,
*Counsel for Petitioners.*

**(Appendix Follows.)**

## Appendix

United States Court of Appeals
for the Ninth Circuit

| | |
|---|---|
| S. H. P. Vevelstad, William L. Pape, and Aurora Nickel Company, a corporation, Appellants, vs. E. Miles Flynn, Appellee. | No. 14,431 Jan. 13, 1956 |

Appeal from the District Court for the District of Alaska, Division Number One

Before Healy, Pope and Fee, Circuit Judges.

Pope, Circuit Judge:

The appellee, as plaintiff in the court below, had judgment against the appellants-defendants quieting title to 45 unpatented lode mining claims located on Yakobi Island in the southwest part of Alaska about 130 miles by water west of Juneau. Upon sufficient evidence the court found that the plaintiff made valid discoveries[1] and had properly located these claims in

[1]The findings are in the opinion of the court which is reported at 119 F. Supp. 93. The evidence shows that plaintiff, a graduate mining engineer, after studying United States geological survey bulletins and Bureau of Mines bulletins containing a rather elaborate description and maps of nickel deposits in what is referred to as Bohemia Basin and vicinity on this Island, went to the Island in October, 1952, for the purpose of making locations

accordance with the provisions of the federal and territorial statutes.

While appellant challenges the sufficiency of the evidence that appellee Flynn staked and located his claims upon the ground and marked the boundaries as required by the Act of Congress[2] and the territorial statute,[3] in our judgment the testimony given on behalf of plaintiff abundantly supports the finding that the requisite posts and other monuments marking the corners, discoveries and center points were erected and located upon each claim, and that in each case the boundaries were blazed or otherwise marked so that they could be readily traced; further, that in

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upon these deposits. With the aid of one Norppa, also a mining engineer, he proceeded to stake out and locate these mining locations. He used as a guide in making the locations the maps contained in Geological Survey Bulletin 931F and particularly one map therein, photostatic copy of which became an exhibit in the case. The trial court also took judicial notice of the contents of the bulletin. As these maps show, and the witnesses testified, the locations were in large part marked by massive out-crops of norite, an igneous rock containing sulphate mineralization bearing nickel and copper.

As these deposits upon which the locations were made were of rock in place, and since the defendants were asserting that they themselves had made discoveries in substantially the same area, the finding of the required discovery is hardly susceptible to question. The geological survey bulletin referred to disclosed that its findings were based upon extensive testing, prospecting and geological studies of these deposits. The bulletin itself would furnish additional evidence of discovery under the principle of Lange v. Robinson, 9 cir., 148 F. 799, 803, which held that the situation of a claim with reference to lands known to contain valuable deposits may have a bearing upon the question of discovery.

(Although these government publications were an important part of the record before the trial court, the failure of either party to furnish copies added considerably to this court's difficulty in obtaining a complete record.)

[2]R.S. §2324, Title 30 U.S.C.A. §28.

[3]Alaska Compiled Laws 1949, §47-3-31.

each instance the requisite location notice was posted in compliance with the territorial statute.

The main question which confronted the trial court was whether at the time of the making of plaintiff's locations the ground was then open to location. The record shows without controversy that as appears from the geological survey bulletin referred to in footnote 1, the mineral deposits upon which these claims were located had been known for a good many years. The bulletin credits their discovery in 1921 to S. H. P. Vevelstad, one of the defendants and an appellant here. Vevelstad testified that he had located this ground in 1920 and 1921 but that the assessment work had not been done and the ground had reverted to the Government.

The last of the series of Acts of Congress which suspended the annual labor requirement upon mining claims was that of June 17, 1949, (Laws of 81st Cong., 1st Sess., Ch. 221, Public Law 107). It suspended the requirement until July 1, 1949. The labor and improvements for the same period had been suspended for Alaska by the Act of June 22, 1948, Ch. 595, 62 Stat. 571. The performance of the annual labor requirement for the year commencing July 1, 1949 and concluding July 1, 1950, was extended until the hour of 12 o'clock noon on the first day of October, 1950, by the Act of June 29, 1950, (Laws of 81st Cong., 2nd Sess., Ch. 404, Pub. Law 582). However, it was not suspended, and as was conceded by all parties before us, the ground here in question first became open to location at noon, October 1, 1950.

Flynn made his locations in the months of October and November, 1952. When he and Norppa were looking over the ground and making the locations, they found no evidence whatever of any other claims having been located in that area. Flynn testified that there was neither blaze nor post nor notice to be found. Norppa testified that he found one or two tin cans that were quite rusted, indicating that they had been there many years. He found one notice in one tin that was weathered so badly that it was illegible. He saw some blazes which he estimated were 15 or 20 years old but they were not in line nor did they indicate any pattern. He found no evidence of any prior mineral location of any kind which indicated it had been placed there within a period of less than five years. During the winter following, however, Flynn became aware that some location notices or certificates had been recorded by and in the name of the defendant Pape in October, 1950, and some additional location certificates for other claims had been executed on behalf of the defendant Aurora Nickel Company by Pape and recorded in July, 1952. These appeared to have some reference to Bohemia Basin and to Yakobi Island for they referred to the mouth of Bohemia Creek. Those recorded in October, 1950 described locations purportedly made on the first day of October, 1950. The certificates recorded in July, 1952, described locations purportedly made on July 1, 1952. For the purpose of ascertaining whether such locations had in fact been made in the area located by him, plaintiff in the spring of 1953, after the

snow had melted sufficiently, caused an investigation to be made upon the ground by witnesses whom he employed for that purpose. One of these witnesses, an experienced mineral surveyor, went over the ground in question, in May and June, 1953. While there he came upon Pape with another person, who was carrying an axe. Afterwards he heard chopping; he followed the sounds and tracks of Pape and his companion and came to freshly cut and squared trees marked as monuments of the locations claimed by the defendants. There was snow on the ground and the fresh chips lay on the snow and in the fresh tracks. The witness went over the entire area here involved, readily found all of the posts and other markings for Flynn's locations and found a few monuments marked with names applied to the claims assertedly located by the defendants. By survey he located all of the monuments thus found relating to defendants' claims upon a map which was placed in evidence. He testified that these were all freshly made and from their appearance must have been made and marked in that year,—1953, and could not have been made between 1950 and 1952.

As defendants purportedly relocated 20 of their claims on various days in June, 1953, filing amended location certificates July 6, 1953, it seems clear that the trial judge must have believed from this testimony that the only visible marking of the boundaries by defendants was made by them in June, 1953 at the time this surveyor found Pape and his companion on the Island.

The mineral surveyor's testimony was corroborated by that of a graduate forester, formerly an employee of the Forest Service, who had had experience in calculating the age of blazes or other marks on trees through examination of the growth rings on them and the formation of callus at the point of the blaze. He also examined the marks found on live trees and used as corners of defendants' claims. Referring to these blazes his testimony was that they must all have been made in the spring of 1953 as they disclosed that there had been but one season's growth since the blazes had been made. The witness made his examination in November, 1953.

The court found that the locations claimed to have been made by Pape in 1950 and 1952 "were not sufficiently marked on the ground". The court stated: "Viewed with the utmost liberality the testimony is insufficient to show that the claims were so distinctly marked as to enable a third person to trace the boundaries by means of cairns or posts erected on the claims above timber line, or by posts, blazes or other marks on claims below timber line. . . ." This finding, in our opinion, has abundant support in the record.[4]

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[4]According to the recorded location certificates, the greater number of locations supposedly made by Pape in October, 1950 were made on October 1, 1950. As hereafter noted, Pape did not testify at the trial and his recorded certificates do not disclose whether the locations were made before or after noon on October 1, 1950. That the trial court was abundantly justified in its skepticism about the claimed locations by the defendants is suggested by the record of the testimony of one Hildre who was employed by Vevelstad to take the latter to Bohemia Creek on Yakobi Island on September 29, 1950. The boat reached its destination at 6 o'clock on the morning of September 30; Vevelstad went ashore and at 9 o'clock came aboard with Pape, whereupon

Indeed the evidence would sustain a belief by the trial judge that the asserted locations by Pape in 1950 and 1952 were purely imaginary. When in the spring of 1953 Flynn went to the area in question to check the possible conflicts suggested by the 1950 and 1952 recordings of defendants' location certificates, he took with him a surveyor from the State of Washington, who was also a Government mineral surveyor, and they were met at the Island on May 14 by Pape. Pape offered to aid them in pointing out the location of his claims but succeeded in demonstrating to the satisfaction of this witness that he was unable to find any of his locations and also that he did not know enough about mining locations to be able to stake or locate one. At any rate this finding of the court sufficiently shows that the ground was vacant at the time of the making of Flynn's locations.

Appellants' supposedly prior locations were also void for another reason. While §28, Title 30 U.S.C.A., merely provides that if records of mining claims are recorded they shall contain "such a description of the claim or claims located by refer ce to some natural object or permanent monument as will identify the claim", yet §47-3-33, Alaska Compiled Laws, 1949, makes such a recording within 90 days after the date of posting the notice of location mandatory with respect to mining locations in Alaska. Subdivision (e)

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the boat shoved off to a place called "Sea Level" across the Straits. Pape remained with the boat until the return to Bohemia Basin after dark on September 30. On the morning of October 1, 1950, about 9 or 10 o'clock, the boat with Pape aboard left Yakobi and returned to Juneau by way of Sea Level and Pelican, reaching Juneau early in the morning of October 2.

of that section provides that there shall be contained in the recorded location certificate: "A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim." The section provides that failure to file the certificate of location as required constitutes an abandonment of the claim and "the ground shall be open to location". The trial court states in its opinion above cited the reasons why it found that the descriptions in the location certificates for all but three of the defendants' claims were insufficient to satisfy this provision of the statute. A reference to the maps in the record and in the bulletins of which the court took judicial notice is sufficient to disclose that if the courses given in the location certificates were projected in the direction of the lines stated, then as the trial court said: "The lines would not intersect anywhere near the claims".

Defendants produced as one of their witnesses a consulting mining engineer who prepared a map showing the location of the defendants' claims in relation to those of the plaintiff's. He had done so after an examination of the ground in question. He testified on cross-examination that in making up his map he located defendants' claims from information given him by Vevelstad. He said that from the information given in the location certificates of the defendants it would be "pretty difficult" to find any of these claims; that the bearings were "not very precise"; the distances

given were "rather vague", and that it would be possible to plat those claims only with outside information obtained from sources other than the location certificates and that the data given on the location certificates were not sufficient to identify the claims.

The trial court's determination that the appellant's location certificates were insufficient and hence under §47-3-33 the ground was open to location at the time the Flynn claims were located is in line with this court's decisions in Vedin v. McConnell, 22 F. 2d 753, and in J. E. Riley Inv. Co. v. Sakow, 98 F. 2d 8. In the first of those cases, Judge Dietrich, speaking for the court and applying an Alaska statute not distinguishable from the present one, said (p. 756): "For reasons which have often been explained, the courts treat with great indulgence inaccuracies and markings prescribed for mining locations. But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law."

The attempted reference to the permanent monument or natural object which this court found wholly inadequate in that case was no more indefinite than the one now before us. The same thing may be said of the location certificate which was held insufficient in J. E. Riley Investment Co. v. Sakow, supra. In the latter case we pointed out the distinction between the facts there and in the case of Smith v. Cascaden, 9

cir., 148 F. 792, where the certificate had been found sufficient "in the absence of evidence" showing that the references to the natural objects and permanent monuments were inadequate. Here the trial court had before it not only the testimony above referred to disclosing the inadequacy of the references, but it took judicial notice of the maps of the geological survey. Examination of those shows that some of the lines sought to be projected by the appellants' location certificates would not even strike Yakobi Island much less the appellants' claims.

Referring to the appellee's claims and the locations thereof which, as we have noted, the court held were sustained by valid discoveries and by sufficient posted notices and markings of the boundaries upon the ground, it is the contention of the appellants that the recorded location certificates of Flynn were themselves insufficient for failure properly to identify the claims by a reference to natural objects or permanent monuments. With respect to this claim the trial court said that "The descriptions given in the location certificates of the plaintiff are such as to make it doubtful whether they are sufficient." But the court further said, "irrespective of these defects, however, the question of the sufficiency of the descriptions is really not involved in this controversy because such an objection is available only to a subsequent locator." This position of the trial court finds support in the statute, §47-3-33, above referred to which contains the proviso: "That full compliance with the provisions of this section after the 90 day period has elapsed but

before the ground has been located by another, shall operate to renew the location and save the rights of the original locator." While, as the trial court suggested, a defect in plaintiff's location certificate would make the ground open to subsequent location, defendants are not in the position of subsequent locators.

We would go farther than the trial court and would draw the conclusion that the location certificates of plaintiffs were sufficient to satisfy the requirements of the territorial and federal statutes. Some of the recorded location certificates are so manifestly adequate in this respect that we are satisfied that the trial court could not have expressed any doubt with respect to them. Thus Pelican No. 30 Mining Claim is described as located 50 feet east of the mouth of Bohemia Creek and a reference to the map shows this to be correct. A similar description is made with respect to Pelican No. 28, which was located 400 feet west of the mouth of Bohemia Creek. However, the greater portion of plaintiff's claims were described in the location certificates with reference to the "Bohemia Basin Camp". The court found after hearing testimony that this referred to a certain cabin. It also found that the only other monument given in each instance was an adjoining claim or claims and found that there was not sufficient evidence that the adjoining claims were well known.

We are of the view that the statute does not require reference to more than one natural object or permanent monument and we think that the court's finding that the reference to Bohemia Basin Camp referred

to the cabin required a conclusion that the statute relating to location certificates was complied with by Flynn.

The appellants' primary contentions on this appeal relate to alleged abuse of the trial court's discretion in denying them a continuance and requiring them to go to trial notwithstanding the absence of the defendant Pape; in not granting them an opportunity to produce Pape as a witness after the trial and before decision rendered; and in holding that Pape's deposition which had been taken before the trial by the appellee was inadmissible in evidence.

The record shows that on October 2, 1953, on motion of the appellee, the case was set for trial immediately following another case which had been set for trial on December 14 following. Counsel for all the appellants was in court at that time. Later his affidavit was filed in support of the motion for a continuance hereafter referred to. It shows that on October 2 he informed the court that Pape might be absent from the country and on board ship on December 14. According to the affidavit he was informed by the court that if that situation arose showing could be made at a later date in support of an application for postponement. Following October 2 and until November 22, Pape was at Seattle, Washington. Although there is a singular absence of showing with respect to the matter, the court below had the right to assume that counsel had notified Pape of the date fixed for the trial. On November 30, 1953, appellants moved for a continuance or postponement of the case on the ground that

on November 26, 1953 Pape had sailed with a ship upon which he was employed as an electrician and that he would not be able to return to the United States until some time in February, 1954. While the affidavit in support of the motion asserted that Pape had made the locations of the defendant's claims in 1950 and in 1952, there was no statement in detail as to what Pape would testify if he were present; there was no showing of diligence in securing his presence by subpoena on behalf of the other defendants or in the taking of his deposition. Plaintiff resisted the motion and made a showing of substantial costs incurred in the procuring of witnesses which were then available and ready to testify. The court, remarking that Pape was a party, not a mere witness, and being of the opinion that he had wilfully absented himself and that the other defendants had made no showing of diligence, nevertheless offered to grant a postponement and continuance on condition they would pay the plaintiff the accrued costs incurred in procuring the presence of witnesses. This offer was rejected by defendants and the motion was denied. We think in this there was neither error nor abuse of discretion. For the same reasons it was not incumbent upon the court to reopen the case for the later taking of Pape's testimony.

In September, 1953, the plaintiff had taken Pape's deposition for discovery purposes. At the trial defendant offered in evidence this deposition. It was marked as an exhibit and received subject to a later ruling of the court as to its admissibility and the dep-

osition appears in the printed record. As the opinion of the trial court shows, it was held that the deposition was inadmissible because it was taken by plaintiff for discovery purposes only. Rule 26(d)(3) F.R.C.P. provides that the deposition of a witness, whether or not a party, may be used by any party if the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition. Since Pape, who presumably knew of the date of the trial, voluntarily left the United States, and as the trial court found, wilfully absented himself, the court's refusal to consider the deposition may well have been in accordance with the provisions of the Rule. However, a reading of the deposition suffices to show that the refusal to receive it in evidence was not prejudicial for there is nothing in the deposition which has any bearing whatever upon the two primary issues which the court was required to consider, namely, was the ground vacant when plaintiff made his locations, and did plaintiff properly discover and locate his claims.

Substantially all of Pape's deposition had to do with his account of certain work and improvements upon certain access roads in the vicinity of the claims. As nothing in the case turns upon whether Pape did or did not perform the annual assessment work, it is plain that the contents of his deposition were wholly unimportant.

The record shows that Flynn was a Canadian citizen and appellants assert that this disqualified him to locate mining claims in Alaska. As this was not an

action in support of an adverse claim and the United States was not a party to the suit, the contention is without merit under the rule of McKinley Mining Co. v. Alaska Mining Co., 183 U.S. 563, 572, that the location by an alien is "free from attack by any one except the government".

Finally, appellants argue that since they incorporated in their answer what they called "a fourth defense and counterclaim", plaintiff's failure to reply thereto constituted an admission of the allegations of that part of the answer. With respect to this we agree with the trial court that the allegations of this fourth defense and counterclaim, which were incorporated from similar allegations in the so-called third defense, were merely denials in affirmative form of the allegations of the complaint. Said the trial court: "Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under rules 7(a) and 8(d) F.R.C.P." This ruling is in conformity with the express provisions of Rule 8(c) F.R.C.P. as follows: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

It is true that the defendants appended to their so-called fourth defense and counterclaim an allegation

that in consequence of the actions of plaintiff they were damaged in the sum of five million dollars by way of loss of profits besides treble that amount as exemplary damages. Under Rule 8(d) allegations as to amounts of damages are never admitted through failure to deny. The effort of the appellants to produce testimony as to damage suffered was wholly frivolous and wanting in substance.

We find no error in the judgment of the court and accordingly the same is affirmed.

(Endorsed:) Opinion. Filed Jan. 13, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 14,431

S. H. P. Vevelstad, et al.,
Appellants,

vs.

E. Miles Flynn,
Appellee.

## JUDGMENT

Appeal from the District Court for the District of Alaska, Division Number One.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Division Number One and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed) Judgment
Filed and entered January 13, 1956,
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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| S. H. P. Vevelstad, William L. Pape, and Aurora Nickel Company, a corporation, Appellants, vs. E. Miles Flynn, Appellee. | No. 14,431 Mar. 5,1956 |

Upon Petition for Rehearing.

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Before Healy, Pope and Fee, Circuit Judges.

In their petition for rehearing, which in general is but a restatement of the contentions made in their original briefs, appellants assert that this court overlooked the fact that the trial court found the descriptions in the location certificates for three of defendants' claims (three Beach claims) to be sufficient. They suggest that we should have held those claims valid.

This Court did not overlook the trial court's exception as to these three claims but expressly referred to it. What appellants overlook is that we approved and sustained the trial court's finding that appellants' locations "were not sufficiently marked on the ground". As we stated, the evidence would warrant belief by the trial judge that the asserted markings of the locations on the ground by Pape "were purely

imaginary". This finding alone required a judgment that none of appellants' claims were valid for the reason that they were not, any of them, marked on the ground prior to appellee's locations. The mere fact that the descriptions in the recorded location certificates of three of defendants' claims may have been adequate was unimportant, for a locator may not acquire a claim merely by walking into the recorder's office and filing a location certificate no matter how perfect the description of the location may be.

Another portion of the petition again undertakes to challenge the validity of the trial court's ruling that irrespective of possible defects in appellee's location certificates that question was not involved in this controversy since such an objection was available only to a subsequent locator and that appellants were not in that position.

Appellants overlook the fact that this court's opinion expressly stated that we went farther than the trial court and held that appellee's location certificates were sufficient to satisfy the statutory requirements. Our decision was not dependent upon the point which appellants here attempt to raise.

The petition for rehearing is denied.

Wm. Healy,
Walter L. Pope,
James Alger Fee,
United States Circuit Judges.

(Endorsed:) Filed Mar. 5, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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Excerpt from Proceedings of Monday, March 5, 1956.

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Before: Healy, Pope and Fee, Circuit Judges.

## ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING AND DENYING PETITION FOR REHEARING

ORDERED that the typewritten per curiam opinion this day rendered by this Court on petition for rehearing in above cause be forthwith filed by the clerk.

FURTHER ORDERED petition for rehearing be, and hereby is denied.

Rule 7. Pleadings Allowed: Forms of Motions

(a) PLEADINGS. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 8. General Rules of Pleading

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(d) EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the re-

sponsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Rule 9. Pleading Special Matters.

(g) SPECIAL DAMAGE. When items of special damage are claimed, they shall be specifically stated.

Rule 10. Form of Pleadings

(c) ADOPTION BY REFERENCE: EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rule 13. Counterclaim and Cross-Claim

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 26. Depositions Pending Action

(d) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions: * * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

Rule 45. Subpoena

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evi-

dence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 53. Masters

(e) REPORT.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Rule 59. New Trials; Amendment of Judgments

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion

court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Rule 60. Relief from Judgment or Order.

(b) MISTAKES: INADVERTENCE: EXCUSABLE NEGLECT: NEWLY DISCOVERED EVIDENCE: FRAUD, etc. Upon motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judg-

ment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.

Section 13, Act of Congress of May 14, 1898, 30 Stat. 415; 48 USC 392; CLA 1933, Section 353; 47-3-9, ACLA 1949, provides:

> "§47-3-9. Reciprocity with Canada: Greater rights not to be accorded: Rules and regulations. Native-born citizens of the Dominion of Canada shall be accorded in Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the former Northwest Territory by the laws of the Dominion of Canada or the local laws, rules and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect."

Act of Congress of June 6, 1900, 31 Stat. 410-411; Section 56-1-91, ACLA 1949, provides:

> "Section 56-1-91. ACTION TO DETERMINE ADVERSE CLAIM. Any person in possession, by himself or his tenant, of real property, may

maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest. (CLA 1913, §1307; CLA 1933, §4001.)"

Section 1, Act of Congress of February 25, 1920, c. 8, 41 Stat. 437; 30 USC 22; §47-3-1, ACLA 1949, provides:

"§47-3-1. Deposits and lands open to exploration, occupation and purchase: Regulations: Local customs and rules. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The Act of Congress of June 6, 1900, c. 786, Section 26, 31 Stat. 329, amended by the Act of Congress of May 31, 1938, 52 Stat. 588, as amended by the Act of Congress of August 8, 1947, c. 514, Section 1, 61 Stat. 916; Title 48 USCA 381, Section 47-3-21, ACLA 1949, provides:

"§ 47-3-21. Extension of United States laws: Lands below line of high tide or high-water mark subject to exploration: Rules and regulations: Exclusive permits: Right to dump tailings:

Pumping from sea: Roadway: Title: Termination of rights by state. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: Provided, That, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, and to the laws for the protection of fisheries, and subject also to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order and the prevention of injury to the fisheries all land below the line of ordinary high tide on tidal waters and all land below the line of ordinary high-water mark on nontidal water navigable in fact, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company to excavate or mine under any of said waters, and if such exclusive permit has been granted it is hereby revoked and declared null and void. The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however,

deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898 (48 USC § 359; § 47-2-2 herein), entitled 'An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes', shall not apply to mineral lands or townsites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privileges acquired hereunder with respect to mining operations in land, title to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by such State, and the said mining operations shall be subject to the laws of such State."

Sec. 47-3-31, ACLA 1949, provides:

"§ 47-3-31. Designation of location of claim: Lode claims: Posting notice: Contents: Monuments: Marking boundary lines: Witness monuments. The discoverer of a lode claim shall designate the location as follows:

(1) By posting on the surface at or adjacent to the point of discovery a plain sign or notice containing:

(a) The name of the lode claim;

(b) The name of the locator or locators;

(c) The date of the location;

(d) The number of feet in length claimed along the vein each way from the point of discovery, and the width on each side of the center of such lode or vein, and

(2) By erecting on the vein at the center of each end line and at each corner or angle of the claim substantial monuments of stone or setting posts, not less than three feet in height nor less than three inches in diameter hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines, and by cutting out, blazing or marking the boundary lines so that they can be readily traced. Where it is impracticable to place a monument in its true position, a witness monument shall be erected and marked so as to indicate the true position of the corner or angle. (L 1933, ch. 83, § 2, p. 160; CLA 1933, § 355.)"

Sec. 47-3-33, ACLA 1949, provides:

"§ 47-3-33. Certificate of location: Recordation: Time for: Contents: Failure to record: Effect: Compliance after ninety days. The locator or locators of any lode claim or placer claim shall within ninety (90) days after the date of posting the notice of location on the claim, cause such claim to be recorded by filing with the Recorder of the Recording District in which the claim is located, a Certificate of Location which shall contain:

(a) The name or number of the claim;

(b) The number of feet in length and width of the claim;

(c) The date of discovering and of posting the notice of location;

(d) The name of the locator or locators;

(e) A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the Certificate of Location, within the ninety (90) days as herein provided, shall constitute an abandonment of the claim and the ground shall be open to location. Provided, however, That full compliance with the provisions of this Section, after the ninety (90) day period has elapsed but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator. (L 1933, ch. 83, § 4, p. 161; CLA 1933, § 357.)"

Sec. 47-3-34, ACLA 1949, provides:

"§47-3-34. Amended locations: Amendment of notices and change of locations: Filing amended certificate of location. Notices may be amended at any time and monuments changed to correspond with the amended location but no change shall be made which will interfere with the rights of others. Whenever monuments are changed or an error has been made in the notice or in the Certificate of Location, an amended Certificate of Location shall be filed for record in like manner and with like effect as the original Certificate. (L 1933, ch 83, §5, p 162; CLA 1933, § 358.)"

Department of Interior Circular No. 430, U. S. Mining Laws, approved April 11, 1922, provides:

"112. Section 13, act of May 14, 1898, according to native-born citizens of Canada 'the same mining rights and privileges' in the Territory of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty and the mining laws of the United States make no provision for such leases."

Chapter 10, SLA 1915, which was repealed by Chapter 64, SLA 1931, provided:

"Section 1. Any person qualified under the laws of the United States, who discovers upon the public domain within the Territory of Alaska, a placer deposit of gold, or other mineral which is subject to entry and patent under the mining laws of the United States, may locate a mining claim thereon in the following manner, to-wit:

* * * * * * *

"Section 2. Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

"(a) The name or number of the claim.

(b) The name of the locator or locators.

(c) The date of discovery and of posting of the location notice.

(d) The number of feet in length and width of claim.

(e) It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

"A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator.

* * * * * * *

"LODE CLAIMS.—HOW LOCATED.

"Section 10. Any person who discovers upon the public domain of the United States, within the Territory of Alaska, a vein, lode, or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable mineral deposit, which is subject to entry and patent under the mining laws of the United States, may, if qualified by the laws of the United States, locate a lode mining claim upon such vein, lode, or ledge by defining and marking the discovery point and the boundaries of the claim, in the manner hereinafter described, and by posting a notice of such location at the point of discovery.

"NOTICE OF LOCATION.—Contents of

"Section 11. The notice of location posted upon the claim must contain the following:

First: The name of the lode or claim.

Second: The name of the locator or locators.

Third: The number of linear feet claimed in length along the center line of the claim, each way from the point of discovery, with the width on each side of center line of the claim at the surface, and the general course of the vein or lode, as near as can be determined.

"DISCOVERY.—How Defined.

"Section 12. The discovery upon which the location is based must, at the time of location, be defined upon the ground by the removal of so much of the surface material as may be necessary clearly to expose to view the discovery claimed, and in such manner as to perpetuate its identity, and preserve it, so far as practicable, from obliteration; also its locus must be witnessed by erecting a substantial monument or post, bearing the notice of location, as near the discovery as practicable.

"BOUNDARIES AND EXTENT OF LODE CLAIMS.

"Section 13. The locator must so define the boundaries of his claim upon the ground that they may be readily traced, and in no case shall the claim extend more than fifteen hundred (1500) feet along the center line of the claim, nor more than three hundred (300) feet on either side of the center line of the claim, at the surface thereof, as near as can be determined.

"In no case shall the markings of the boundaries of the claim upon the ground consist of less than the following: The erection at each corner of the claim and at each angle in the side lines, if such there be, of a substantial monument or stake, or the blazing of a tree, at least three inches in diameter, each of which shall bear the initial of the lode or claim and a designation as to the point upon the boundaries of the claim which the said monument represents. The center line and both end lines shall be marked by blazing trees or by cutting brush, or the erecting of line monuments, as the nature of the country requires so that the lines of the location may be readily traced upon the ground.

"Where the true point for a corner or angle corner is for any reason inaccessible or the erection of a monument thereat is impracticable, a witness monument may be erected as near to the true point as practicable, which witness monument must be so marked as to indicate with reference thereto the position of the true point for the corner or angle point. Such witness corner or monument shall not be of lesser size than is prescribed for other corners.

"The completion of the marking of the boundaries of the claim upon the ground shall follow the posting of the notice of location within a reasonable time, not to exceed thirty (30) days.

"RECORD OF LOCATION.

"Section 14. Within ninety (90) days of the posting of the location notice upon the claim, a certificate of location shall be recorded with the Recorder of the District within which the claim

is located. Such certificate must contain date of location, name or names of locator or locators, and such a description of the claim, with reference to some natural object or permanent monument, as will identify the claim located, and may also contain such further matter as will serve to more completely describe the boundaries and locus of the claim.

"AMENDED LOCATIONS AND CERTIFICATES.

"Section 15. A locator or claimant may at any time, subject to intervening rights, amend his location and make any desired change in his boundaries, by marking the location, as amended, upon the ground, and by filing an amended certificate of location, such marking and certificate to conform to the requirements of this Act with reference to an original location.

"A defect in a recorded certificate of location may be cured by filing an amended certificate.

"TUNNEL RIGHT.—Location of.

"Section 16. Any person who possesses the qualifications necessary for the locator of a lode may locate a tunnel right or location by posting a notice of location at the portal of the tunnel, which notice must contain:

First: The name of the locator or locators.

Second: The date of location.

Third: The proposed course or direction of tunnel.

Fourth: Such a description of the tunnel, with reference to some natural object or permanent monument as will serve to identify it.

"Boundaries of the Tunnel Location: The boundaries of the tunnel location shall be marked upon the ground by means of stakes or monuments placed along the proposed course or direction of the tunnel at intervals of not more than six hundred (600) feet from the portal of the tunnel to the terminus of three thousand (3000) feet therefrom, and the line blazed as required under lodes.

"Record of Location: Shall be performed as required under lodes.

"Assessment Work on Tunnel Sites: During each year, including the year of location, five hundred ($500.00) dollars worth of labor shall be performed or improvements made on each tunnel site heretofore or hereafter located; and proof of such annual labor shall be made and recorded in the manner required under the provisions of this Act relating to lode claims; provided, that the cost of making survey of such tunnel site shall NOT be counted toward such annual expenditure.

"LOCATION OF MILLSITE CLAIMS.

"Section 17. The proprietor of a lode claim (or the owner of a quartz mill or a reduction works situate upon the land proposed to be located), may locate not more than five acres of non-mineral land as a millsite, by posting thereon a notice of location and by marking the boundaries thereof as hereinafter provided.

"The notice of location must contain:

First: The name of the locator or locators.

Second: The name of the lode claim or claims to which the millsite is appurtenant, or of the

quartz mill or reduction works, owned by the locator or locators.

Third: The date of location.

Fourth: The amount of surface ground claimed.

Fifth: Such a description of the millsite with reference to some natural object or permanent monument as will identify it.

"The boundaries and corners of the millsite must be marked upon the ground in the same manner as required by the Act for lode locations.

"Recording shall be performed as required under lodes.

"Assessment Work on Millsites: During each calendar year after the year of location and until patent has been issued therefor, at least twenty-five ($25.00) dollars worth of labor shall be performed or improvements made upon each millsite claim heretofore or hereafter located in the Territory of Alaska.

"And the locator or owner of such claim, or some person having knowledge of the facts, shall make and file with the Recorder of the District in which the claim is situate an affidavit showing the performance of labor or making of improvements to the amount of twenty-five ($25.00) dollars as aforesaid, and specify the character and extent of such work in the manner set forth in this Act under the provisions relating to proof of labor on lode claims.

"And the Recorder shall collect a fee for filing, indexing and recording each such proof of annual labor on millsites, of the same amount and

in a similar manner as hereinafter provided under the section of this Act relating to proofs of labor on lode claims.

"PROVIDED, that the claimant or owner of any millsite claim in the Territory of Alaska shall have the privilege of paying on or before the 31st day of December of the current year to the Territorial Treasurer of Alaska the sum of twenty-five ($25.00) dollars, lawful money of the United States in lieu of expending the said amount on labor or improvements on the said millsite claim in said current year.

"The Territorial Treasurer shall issue a receipt therefor, which receipt shall bear upon its face the name of the said millsite claim, the name of the claimant thereto, the name of the person making the payment, and such description of, or reference to the location notice of the said claim as will positively identify it; and the recording of such receipt with the Recorder of the District in which such claim is situate, within ninety (90) days after the issue thereof, shall be deemed the equivalent of the performance of twenty-five ($25.00) dollars worth of annual labor or making of improvements on or for the benefit of said millsite claim.

"PROVIDED, also, that the cost of making a survey of such millsite claim by a United States Mineral Surveyor shall be deemed to fall within the meaning of the term 'making of improvements' as hereinbefore used; the procedure in such case to follow the requirements of this Act relating to the survey of lode claims in all respects.

"SURVEY OF MINING CLAIMS.

"Section 18. Where a locator or owner of a lode, tunnel site or millsite claim has all the exterior lines, or the boundaries of his claim surveyed, and the corners established by a United States Mineral Surveyor; corner No. 1 of the location should be connected by course and distance with the nearest corner of the public survey or with a United States Monument, if the claim lies within two miles of such corner or monument. In case the claim is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, the United States Mineral Surveyor will proceed to establish such mineral monument in accordance with the requirements of the United States Mining Laws. The locator will incorporate into his amended location notice the field notes of said survey which shall contain a certificate by said Mineral Surveyor, setting forth:

"First: That such survey was actually made by him in his own proper person, giving the date thereof, and the name of all assistants.

"Second: The name of the claim and locator or locators thereof.

"Third: That the description incorporated into the amended location notice is sufficient to identify the locus of the claim.

"An amended location notice, including said field notes and accompanying certificate, is prima facie evidence of the facts therein contained, and shall be recorded with the Recorder of the district within which the claim is located.

"ANNUAL ASSESSMENT WORK.

"Section 19. On each location one hundred ($100.00) dollars worth of labor shall be performed or improvement made during each calendar year until the Register's final certificate therefor has been issued.

"PROVIDED, that the period within which the work required to be done annually on all unpatented lode claims shall commence on the first day of January succeeding the date of location of such claim; and if the claim includes more than one location, under one ownership, and the locations are contiguous the annual assessment work, to an amount of one hundred ($100.00) dollars for each included location, may be done in common, provided such work and improvement tends to the benefit of the entire group, in accordance with a systematic plan therefor.

"Section 20. And it is further provided, that a survey of the claim or claims by a United States Mineral Surveyor may be credited to annual assessment work, but in no case shall the credit for such survey and its attendant expense, exceed the required assessment for one year on the claim or claims surveyed. When credit is sought for such work or improvement, the claimant must file in the Recorder's Office in the district in which the claim lies, the field notes of the survey, together with a voucher showing the cost of such survey, properly attested by the surveyor, incorporated into the proof of annual labor, as in case of other classes of labor or improvements, as provided for in Section 19 of this Act.

## "RECORDING OF AFFIDAVIT OF ANNUAL LABOR.

"Section 21. The owner of a lode claim or claims, or some other person having a knowledge of the facts, shall record with the Recorder of the District wherein such lode claim or claims is or are situated, an affidavit showing the performance of annual labor or the making of improvements to the value of one hundred ($100.00) dollars upon or for the benefit of each claim.

"PROVIDED, that the owner of a group of contiguous lode claims may incorporate within a single affidavit his proof of labor performed or improvements made upon or for the benefit of each, any or all of the locations embraced within such groups.

"In all cases the affidavit shall set forth the following:

First: The name of the claim or claims, and where situated.

Second: A detailed description of the work done or improvements made upon, or for the benefit of each claim, together with the location of the same with reference to the boundaries of the claim.

Third: The date of performance of such labor or of making of improvements.

Fourth: The number of days work done on or for the benefit of the claim, and the character and value of the improvements made.

Fifth: At whose instance the work was done and improvements made.

Sixth: The actual amount paid for such work and improvements, and by whom paid.

Seventh: The wages charged which shall be at the customary daily rate prevailing in the district in which the work is done.

Eighth: A declaration that the time or expense of traveling to and from the claims has not been included in computing the cost of such assessment work.

Ninth: That not more than eight hours work per man in any one day has been charged to such assessment work.

"Such affidavit shall be filed with the Recorder of the District within which the claim or claims are located, not later than ninety (90) days from the close of the calendar year during which the work was done or improvements made.

"For the filing, recording and indexing of such affidavit the Recorder shall receive the customary fee for the filing of a notice of location of a mining claim in the district wherein he is Recorder, and in addition thereto, the sum of twenty-five (25¢) cents for each and every claim included in the affidavit above a single claim, when such affidavit covers a group of contiguous locations.

"Should the locator of a lode claim, tunnel site or millsite, (or his heirs or assigns) fail to comply with any of the provisions of Sections ten (10) to twenty-one (21) inclusive of this Act, the burden of proof shall be upon the owner of such claim or claims as to the compliance with the provisions hereof. In the event of any failure,

a re-location of the lands involved shall be void if made directly by or indirectly in the interest of, such delinquent locator or his successors in interest, until one calendar year shall have elapsed since the failure obtained.

* * * * * * *."

JUN 1 1956
HAROLD B. WILLEY, Cle

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

No. 992 128

S. H. P. VEVELSTAD and AURORA NICKEL COMPANY, a corporation,
*Petitioners,*

vs.

E. MILES FLYNN,
*Respondent.*

**SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.**

R. E. ROBERTSON,
200 Seward Building, Juneau, Alaska,
*Counsel for Petitioners.*

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# In the Supreme Court
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No.

S. H. P. VEVELSTAD and AURORA NICKEL COMPANY, a corporation,
*Petitioners,*

vs.

E. MILES FLYNN,
*Respondent.*

## SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI
### to the United States Court of Appeals for the Ninth Circuit.

The petition of S. H. P. Vevelstad and Aurora Nickel Company, a corporation, that a Writ of Certiorari issue to review the Decision and Judgment of the United States Court of Appeals for the Ninth Circuit respectfully shows:

That since the preparation and certification on April 3, 1956 of the record herein by the Clerk of

the Honorable United States Court of Appeals for the Ninth Circuit further matters have occurred in the Honorable United States Court of Appeals arising out of these Petitioners having received information that caused them to believe that the Mandate (Appen. p. 1) issued by that Honorable Court on March 20, 1956, as well as the Judgment (R. 119-122) entered by the Honorable District Court on April 24, 1954, was obtained by fraud, misconduct and misrepresentation of Respondent Flynn through a conspiracy with Appellant Pape, now deceased, whereby Respondent Flynn paid Pape to absent himself from the trial of this cause although he was a material witness on behalf of Petitioners and to place himself beyond reach of subpoena or other process of the District Court.

In pursuance thereto these Petitioners made and on May 14, 1956, presented their Motion (Supp. T. 2, et seq.), with supporting affidavits, under Rule 60, FRCP, to the Honorable United States Court of Appeals for the Ninth Circuit, which Motion that Court denied on May 15, 1956 (Supp. T. 11), without argument, but also having before it, without knowledge of or service upon Petitioners, Respondent's Motion (Supp. T. 7, 8, 9) to Deny Petitioner's Motion, and Affidavits and Brief, which were never served upon Petitioners and who had no knowledge of them until May 25, 1956, when their counsel received a copy of the Supplemental Transcript, whereupon he immediately telegraphed the Clerk of the Court as follows: "I respectfully protest your Honorable Court's denial of Appellants Vev-

elstad and Aurora Nickel Company's motion to vacate mandate and judgment under Rule 60(b), FRCP upon further ground that not until I today received supplemental transcript for petition writ certiorari to U. S. Supreme Court did I know that Appellee had filed motion to deny Appellants' motion or submitted affidavits and brief in support thereof nor was I ever served with those documents which I submit Appellants were entitled to right to refute."

That Petitioners pray leave hereby to supplement their original Petition which has been heretofore or is about to be filed with the Clerk of this Honorable Court by reference thereto, not actually printing it in that Petition because of the exigencies of time and the practical necessity of having their Petitions printed in San Francisco, California, although prepared in Juneau, Alaska, and fearing that delay might result in failure to file their original Petition with the Clerk of this Honorable Court within 90 days after March 5, 1956, on which date the Honorable United States Court of Appeals for the Ninth Circuit denied Petitioners' Petition for Rehearing (Supp. T. 1).

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**OPINIONS.**

United States Court of Appeals for the Ninth Circuit, January 13, 1956, unreported (R. 723).

United States Court of Appeals for the Ninth Circuit, denying petition for rehearing, March 5, 1956, unreported (R. 734).

District Court for the Territory of Alaska, First Division, 119 F. Supp. 93, 14 Alaska Reports 557 (R. 97-106, USCA 9, No. 14,431).

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**GROUNDS ON WHICH JURISDICTION IS INVOKED.**

**Original Petition.**

This Honorable Court's jurisdiction is invoked because the United States Court of Appeals for the Ninth Circuit in affirming the Judgment of the District Court for the District of Alaska, Division Number One,

(a) indulged in a wholly strained and hampering construction of Rules 7(a), 8(a) and (d), 13(a), 26(d)(3)(2), 52, 53(e)(2), and 59(a), Federal Rules of Civil Procedure, promulgated by this Court's Advisory Committee which it appointed under Section 2, Act of June 19, 1934, c. 641, 48 Stat. 1064, which Rules were made effective in Alaska by Public Law 175, Act of Congress approved July 18, 1949, c. 343, p. 2, 63 Stat. 646, 28 USC 2072, whereas those Rules are intended to be and should be liberally construed to protect litigants' rights. Such illiberal construction, if not overthrown, will eventually become an authority, certainly in the Ninth Circuit, to destroy the actual intendment of those Rules.

(b) imposed an illegal limitation upon an original locator of a lode mining claim in holding that, under the Act of Congress of May 31, 1938, 52 Stat. 588, 48 USCA 381-384, as supplemented by Sections 47-3-31,

47-3-33, and 47-3-34, Alaska Compiled Laws Annotated 1949, he cannot question the sufficiency of the lode mining claim location made subsequently by another, but that the latter can question the sufficiency of the former's location, thereby unjustly discriminating against the original locator in litigation between him and the subsequent locator contrary to the United States mining laws.

(c) held that a self-admitted, volunteered admission of Canadian citizenship did not disqualify that Canadian citizen from locating a lode mining claim in Alaska despite neither Section 13, Act of Congress of May 14, 1898, 30 Stat. 415; 48 USC 392; Section 47-3-9, ACLA 1949, nor Section 112, Department of Interior Circular No. 430, U. S. Mining Laws, approved April 11, 1922, were before this Honorable Court when it rendered its decision in *McKinley Creek Mining Company v. Alaska Mining Co.*, 183 US 563, 571. This holding is of great importance to the Alaska mining industry, because, under it, although under Section 13, Act of May 14, 1898, supra, native born Canadian citizens are limited to such mining rights in Alaska as are reciprocally accorded to American citizens in British Columbia and the Northwest Territory, which reciprocity is not extended, according to the Department of Interior's Circular No. 430, supra, to American citizens by Canada, a self-admitted Canadian citizen, whether native born or not, can establish title to his self-located mining claim in Alaska as against an American citizen who did not originate the attack upon the Canadian locator's citizenship.

**Supplemental Petition.**

(d) denied Petitioner's Motion, under Rule 60(b), to Vacate its Mandate of March 20, 1956 (Appen. p. 1) and the District Court's Judgment of April 24, 1954 (R. 119-122), or, in the alternative, to authorize Petitioner to bring an independent action in the District Court to vacate that Court's Judgment.

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## JUDGMENTS AND ORDERS BELOW.

The judgment sought to be reviewed was entered January 13, 1956 (R. 733), affirming the trial Court's judgment entered April 24, 1954 (R. 119).

The order denying petition for rehearing was entered March 5, 1956 (R. 734).

The order of May 15, 1956, denying Petitioner's Motion to Vacate under Rule 60(b) (Supp. T. 11).

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## STATEMENT OF JURISDICTION.

Section 1254, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 928, provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.
>
> "* * *"

Section 1291, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 929, amended October 31, 1951, c. 55, Title 48, 65 Stat. 726, provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, the District Court of Guam, except where a direct review may be had in the Supreme Court."

This case does not involve a decision invalidating an Act of Congress, nor any order by a three judge Court; hence, no direct appeal could have been taken under either Section 1252 or Section 1253, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 926.

The Federal Rules of Civil Procedure were made effective in Alaska by Public Law 175, Act of Congress approved July 18, 1949, c. 343, ¶ 2, 63 Stat. 646, 28 USC 2072.

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**QUESTION.**

Should the United States Court of Appeals under Rule 60(b) have denied peremptorily, without argument but having before it Respondent's Motion, Affidavits and Brief (Supp. T. 7, 8, 9), whereof service had not been made upon or notice given to Petitioners under that Court's Rule 17(1), the Petitioners' Motion (Supp. T. 2, et seq.) to vacate for fraud, miscon-

duct and misrepresentation by Respondent the District Court's Judgment (R. 119-122) and the Appeals Court's Mandate (Appen. p. 1) affirming that Judgment or, in the alternative, granted Petitioners permission to apply to the District Court to vacate its Motion, which Motion, with supporting affidavits made a *prima facie* case of fraud, misconduct and misrepresentation by Respondent and was made and filed within less than 30 days after Petitioners obtained those supporting affidavits and within less than 60 days after the Appeals Court's Mandate of March 20, 1956, but more than one year after the entry of the District Court's Judgment of April 24, 1954, which was affirmed by the Appeals Court's Opinion (R. 723) of January 13, 1956, and Opinion (R. 734) of March 5, 1956, denying Petitioners' Petition (Supp. T. 1) for rehearing.

The Appeals Court's Denial of Petitioners' Motion to Vacate nullifies in the Ninth Circuit the intended benefits of Rule 60(b) for litigants who have had a Judgment entered against them through fraud, misconduct, and misrepresentation of the adverse party but of which they did not obtain evidence until more than one year had elapsed after the entry of that Judgment against them and subsequently to that Judgment, through the continuance of the same fraud, misconduct, and misrepresentation, had been affirmed by the Appeals Court and ignored its Rule 17(1) in not requiring service upon and five days notice to Petitioners of Respondent's Motion to Deny, Affidavits and Brief (Supp. T. 7, 8, 9).

## RULES AND STATUTES INVOLVED.

Rule 60(b), Federal Rules of Civil Procedure, subsection 3 whereof provides:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, . . ."

Rule 60(b) also provides:

> "The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Rule 60(b) further provides:

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the Court."

Rule 17(1), United States Court of Appeals for Ninth Circuit, provides:

> "1. All motions to the Court shall be reduced to writing, shall contain a brief statement of the facts and objects of the motion, shall be supported by points and authorities, and, where the facts are not otherwise proved in the cause, by affidavits, and shall be served upon opposing counsel at least 5 days before the day noticed for the hearing."

**STATEMENT OF CASE.**

Petitioners pray leave to incorporate herein by reference thereto their Statement of Case in their original Petition for Writ of Certiorari, page 8, which they supplement by stating that since the certification on April 3, 1956 of the record by the Clerk of the United States Court of Appeals for the Ninth Circuit they obtained affidavits from one Lydia Konnerup and B. C. Konnerup (Supp. T. 3, 4), which distinctly show that Respondent obtained the absence of Appellant Pape, who the District Court said was a material witness (R. 135-136), from the trial, and that Respondent paid Pape "for his interest and his investment in consideration of his 'shipping out' of the United States to Korea and not to appear as a witness against Respondent at the trial." Those affidavits are inferentially corroborated by Harold Reade's affidavit (Supp. T. 5).

Pape did not appear as a witness at the trial although Petitioners unsuccessfully attempted to obtain postponement of the trial until his attendance could be obtained (R. 76, 82, 83, 133, 153), and also requested the trial Court to defer decision until Pape's evidence could be obtained (R. 95).

Promptly upon obtaining those affidavits, Petitioners made their Motion to Vacate under Rule 60(b) (Supp. T. 2, et seq.).

The Appeals Court without argument, but permitting, without knowledge of or service upon Petitioners, Respondent to refute by Motion, Affidavits and Brief (Supp. T. 7, 8, 9), denied the Motion on May 15, 1956

(Supp. T. 11), which Motion was presented to it on May 14, 1956. The denial included that of Petitioners' application for permission to apply to the District Court by motion or other appropriate proceedings to vacate that Court's judgment of April 24, 1954.

---

**ARGUMENT.**

Petitioners made their Motion to Vacate (Supp T. 2, et seq.) under Rule 60(b) on May 9, 1956, and it was presented, without argument, to the Honorable United States Court of Appeals for the Ninth Circuit on May 14, 1956, which denied it by its Order of May 15, 1956 (Supp. T. 11).

If the Appeals Court considered Respondent's Motion, Affidavits and Brief (Supp. T. 7, 8, 9), then it did so without requiring Respondent to comply with its own Rule 17(1), supra, and to make service upon and give 5 days notice thereof to Petitioners. Nor does the record disclose, so far as Petitioners can note, any special assignment of the matter. If the Appeals Court did not consider Respondent's Motion, Affidavits and Brief, then Petitioners' Motion to Vacate, with accompanying affidavits (Supp. T. 2, et seq.), made a *prima facie,* unrefuted cause of fraud, misconduct and misrepresentation by Respondent in obtaining the Appeals Court's Mandate (Appen. p. 1) and the District Court's Judgment (R. 119-122).

The United States Court of Appeals entered its Mandate on March 20, 1956 (Appen. p. 1) after rendering its Opinion and denying Petitioners' Petition

for Rehearing on March 5, 1956 (R. 734), having previously rendered its Opinion (R. 723) on January 13, 1956, affirming the District Court's Judgment of April 24, 1954 (R. 119-122).

Petitioners' Motion to Vacate was made and presented within less than one year from the United States Court of Appeals' Mandate of March 20, 1956, Order denying Petition for Rehearing on March 5, 1956, and Opinion of January 13, 1956.

Petitioners couldn't have earlier obtained information concerning Respondent's fraud, misconduct and misrepresentation. Only by Pape's admission could they acquire it. They made their Motion within 30 days after they obtained the Konnerup and Reade affidavits. See Vevelstad affidavit (Supp. T. 6). They couldn't anticipate that Pape would unexpectedly die.

Petitioners took the only action available. They made their Motion to Vacate in the United States Court of Appeals which had affirmed the District Court's Judgment. Had they brought an independent action in the District Court, they would undoubtedly immediately have been met with the contention that the District Court was bound by the United States Court of Appeals' Mandate directing it to enter Judgment against them and in favor of Respondent. Respondent substantially makes that very contention in his unserved Brief in Support of his Motion to Deny (Supp. T. 8(5)). They prayed in their Motion (Supp. T. 3, 4) to Vacate under Rule 60(b), in the alternative, that the Appeals Court might grant them permission to apply by motion or other appropriate proceedings to the District Court to vacate its said Judgment,

which the Appeals Court also denied when it denied their Motion on May 15, 1956 (Supp. T. 11).

Respondent advanced his fraud, misconduct and misrepresentation before the District Court not only by continuing to represent himself as a litigating adversary of Pape, to whose interest he had succeeded (Konnerups' Affidavits, Supp. T. 3, 4), but also by opposing Petitioners' Motion for continuance of trial (R. 76) and representing through his counsel's affidavit (R. 78-81) that Petitioners knew of Pape's intention to not be present and that they could have taken Pape's deposition and that Pape was unwilling to be a witness because he knew that Respondent had overwhelming evidence that he, Pape, did not in fact locate Petitioner Aurora Nickel Company's mining claims in October, 1950, or at any time prior to Respondent making his locations (R. 80).

Respondent necessarily continued that fraud, misconduct and misrepresentation before the United States Court of Appeals when he opposed Appellants' appeal, thereby in actuality maintaining that the District Court's Judgment (R. 119-122) of April 24, 1954, should be affirmed because it had been entered after a fair, impartial trial without fraud, misconduct or misrepresentation by Respondent. Had he confessed his fraud, misconduct and misrepresentation to the Appeals Court it undoubtedly would not have affirmed the District Court's Judgment.

Petitioners now stand remediless despite Respondent's fraud upon, misconduct in, and misrepresentation to both the United States Court of Appeals and the District Court.

This Honorable Court has held that a federal court has inherent power to investigate whether a Judgment was obtained by fraud and may bring before it all those who may be affected by outcome of its investigation.

*Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 66 S. Ct. 1176, rehearing denied, 329 U.S. 823, 67 S. Ct. 24.

Here, the Appeals Court made or caused to be made no investigation, except such if any consideration in violation of its own Rule 17(1) it gave to Respondent's Motion, Affidavits and Brief (Supp. T. 7, 8, 9) without requiring service upon or notice thereof to Petitioners, notwithstanding that Petitioners' Motion to Vacate made a *prima facie* case of Respondent having obtained his Judgment in the District Court through fraud, misconduct and misrepresentation, and having maintained before the Appeals Court, when he opposed Petitioners' appeal for reversal of that Judgment, his fraud, misconduct and misrepresentation.

The United States Court of Appeals for Delaware and Pennsylvania held that not only can the trial court vacate its own Judgment for fraud but likewise the appellate court can, for fraud, vacate a decree of the trial court entered pursuant to the Appellate Court's Mandate.

*Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514, cer. den. 69 S. Ct. 481, 335 U.S. 912, rehearing den. 69 S. Ct. 602, 336 U.S. 915.

nited States Court of Appeals for the
Clearly the Unit could have vacated its Mandate of
Ninth Circuit co (Appen. p. 1), which Petitioners in
March 20, 1956 ( Vacate (Supp. T. 2, et seq.) prayed
their Motion to V
that it do.

ere were prevented by Respondent's
Petitioners her uct and misrepresentation from pre-
fraud, misconduc rits of their case because in Pape's
senting the merit d by Respondent, they were unable
absence, obtained location after noon of October 1, 1950,
to prove Pape's lo rora Nickel Company's mining claims
of Petitioner Aur spondent's locations, and that the 1951
and prior to Resp ment work was done for and did ben-
and 1952 assessm e claims, and that the ground was not
efit each of those n by Respondent in November and
open to location
December, 1952.

urt found Pape would have been a
The trial Cou s (R. 135-136). Pape's affidavit (R.
material witness that he would have been a material
109-112) shows t e Petitioners' cause. Petitioners did
witness to prove ape's absence (R. 82-88; 342). Re-
not procure Pa ed he had no evidence that Petitioners
spondent admitte ape's absence, and stipulated that Pe-
had obtained Pa ad would testify they had not done so
titioner Vevelsta 's deposition was rejected at Respond-
(R. 342). Pape' er Petitioners' protests, by the trial
ent's request ov round that it had been taken by Re-
Court on the gr scovery purposes only (R. 99).
spondent for dis

Petitioners sul bmit that Respondent's fraud, miscon-
duct and misrep resentation, as stated in their Motion
to Vacate, with accompanying affidavits (Supp. T. 2,

et seq.) were sufficient grounds for vacating the Appeals Court's Mandate of March 20, 1956, and the District Court's Judgment of April 24, 1954.

*Assman v. Fleming,* C.C.A. Neb. 1947, 159 F. 2d 332.

Jurisdiction of the case was vested in the United States Court of Appeals for the Ninth Circuit on April 28, 1954, when Petitioners filed their Notice of Appeal (R. 122).

*Smith v. Pollin,* 194 F. 2d 349, 90 U.S. App. D.C. 178.

Petitioners thenceforth, even had they had the information which they did not, could not have made and presented their Motion to Vacate to the District Court, because they would have been met with the contention that the District Court had no jurisdiction.

Petitioners submit that the Appeals Court's Judgment (R. 733) of January 13, 1956, and its Order (R. 734) of March 5, 1956, and its Mandate of March 20, 1956 (Appen. p. 1) are each such a final judgment, order, or proceeding as are intended by Rule 60(b) when it says:

> "On motion and upon such terms as are just the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . ."

and

> "This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding. . . ."

Hence, that the Appeals Court could and properly should have granted Petitioners' Motion to Vacate its Mandate, which was made within much less than a year of its entry, and also the District Court Judgment, and that no authority exists for Petitioners to institute an independent action in the Appeals Court to set aside its Judgment, Order and Mandate, and, should Petitioners institute an independent action in the District Court for relief from the latter's Judgment of April 24, 1954, they will be opposed on the ground that they didn't make a Motion under Rule 60(b) to Vacate that Judgment within one year from its entry and that the District Court has no jurisdiction to entertain an independent action because the Judgment now is in reality the Appeals Court's Judgment, not the District Court's Judgment.

Wherefore Petitioners pray that their petition for a Writ of Certiorari may be granted and that the Appeals Court's Mandate of March 20, 1956, and the District Court's Judgment of April 24, 1954, may be vacated, or, in the alternative, they may be authorized to bring an independent action in the District Court to set aside that Court's Judgment of April 24, 1954.

Dated, Juneau, Alaska,
May 22, 1956.

Respectfully,
R. E. ROBERTSON,
*Counsel for Petitioners.*

**(Appendix Follows.)**

## Appendix

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the District Court for the District of Alaska, First Division, Greeting:

WHEREAS, lately in the District Court for the District of Alaska, First Division, before you or some of you, in a cause between E. MILES FLYNN, Plaintiff, and S. H. P. VEVELSTAD, WILLIAM L. PAPE and AURORA NICKEL COMPANY, a corporation, Defendants, No. 6840-A, a Judgment was duly filed on the 24th day of April, 1954; which said Judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

AND WHEREAS, the said S. H. P. Vevelstad, William L. Pape and Aurora Nickel Company, a corporation, appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, on the 19th day of April, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth

Circuit, on the said transcript of record, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed. (January 13, 1956)

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Earl Warren, Chief Justice of the United States, the twentieth day of March in the year of our Lord one thousand nine hundred and fifty-six.

/s/ Paul P. O'Brien
Clerk, United States Court of
Appeals for the Ninth Circuit

FILED
JUN 30 1956
HAROLD B. WILLEY, Clerk

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1955

No. 992[illegible] 128

S. H. P. VEVELSTAD and AURORA NICKEL COMPANY, a corporation,

*Petitioners,*

vs.

E. MILES FLYNN,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

JOHN H. DIMOND,
P. O. Box 1121, Juneau, Alaska,
*Counsel for Respondent.*

N. C. BANFIELD,
P. O. Box 1121, Juneau, Alaska.

GEORGE F. WARD,
Hoge Building, Seattle, Washington,
*Of Counsel.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

No. 992

S. H. P. VEY[illegible]STAD and AURORA NICKEL COMPANY, a [illegible]rporation,
*Petitioners,*

vs.

E. MILES FLY[illegible],
*Respondent.*

**RESP[illegible]DENT'S BRIEF IN OPPOSITION TO PET[illegible]ON FOR A WRIT OF CERTIORARI to United States Court of Appeals for the Ninth Circuit.**

*To the Hono[illegible]le Earl Warren, Chief Justice of the United St[illegible]tices of t[illegible]s, and to the Honorable Associate Justices of the Supreme Court of the United States:*

E. Miles [illegible]ynn, respondent herein, respectfully prays that t[illegible]petition for a writ of certiorari to the United Stat[illegible]ourt of Appeals for the Ninth Circuit

of petitioners, S. H. P. Vevelstad and the Aurora Nickel Company, be denied.

---

## OPINIONS BELOW.

The opinion of the District Court is reported at 119 F.Supp. 93; the opinion of the Court of Appeals, at 230 F.2d 695.

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## QUESTION PRESENTED.

Whether petitioners have set forth any special and important reasons why this Court should review the decision of the court below.

---

## STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, infra, pp. iii-v.

---

## STATEMENT OF THE CASE.

In June 1953, respondent commenced an equitable action in the District Court, under the provisions of Sec. 56-1-91, ACLA 1949, to quiet title to certain unpatented mining claims situated on Yakobi Island in Southeastern Alaska, approximately 130 miles by water west of Juneau, Alaska. (R.1-8.) Respondent contended that he was the owner of such claims by virtue of valid discoveries and proper locations made

in September and October 1952 in compliance with the mining laws of the United States and the Territory of Alaska (R. 1-8); that petitioner asserted some right, title or interest to the ground area embraced within the boundaries of respondent's locations by reason of purported prior locations by petitioners; and that such alleged claims of petitioners constituted a cloud upon the title of respondent to the unpatented mining claims which he had discovered and located. (R. 1-8, 53-61.)

Petitioners' principal defense to this action was that the land was not open to location in September and October 1952, by reason of the fact that they had made prior discoveries and locations of claims in the same area in October 1950 and in July 1952, and that thus being prior locators, they were the owners of the claims. (R. 67-75.)

After a trial of the action the District Court, on March 9, 1954, found the following:

1. That the purported locations of 26 claims made by petitioners in 1950 and 1952 were not sufficiently marked on the ground and that the description of such claims in the location certificates were insufficient; and, therefore, that the land embraced in the area of such purported claims was vacant, unappropriated and open to location in October and November 1952 when respondent made his locations. (R. 100-104.)

2. That the 45 claims of respondent were marked in substantial compliance with the relevant statutory

that, therefore, he was entitled to have
quieted as against petitioners. (R. 104-
provisions and tha
his title thereto qu
106.)

ordance with such findings, the District
24, 1954, entered its judgment in favor
Hence, in accord (R. 119-122.)
Court on April 24,
of respondent. (R
motion for a new trial, filed on March
07-109), was denied by minute order
Petitioners' mot court on April 24, 1954 (R. 118), and
16, 1954 (R. 107-
of the district cou
54, an appeal was taken by petitioners
States Court of Appeals for the Ninth
on April 28, 1954,
to the United Sta
ng with the district court a notice of
2.) On January 13, 1956, the court of
Circuit by filing
appeal. (R. 122.)
s written opinion and entered judgment
judgment and decree of the district
appeals filed its w
affirming the jud
March 5, 1956, denied a petition for
*I. P. Vevelstad, et al. v. E. Miles Flynn*,
court, and on Ma
rehearing. *S. H. P*
230 F.2d 695.
months subsequent to the date that the
ffirmed the judgment of the District
Some four mon
court below affir
months after the denial of the petition
petitioners filed their motion with the
Court, and two mo
for rehearing, pet
als, purportedly being based on subdivi-
le 60(b), Federal Rules of Civil Proce-
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dure, to vacate th
e the judgment of the District Court.
sion (3) of Rule 60
(Supplemental Tr
Tr. of R.) This motion was denied on
ay 25, 1956, the appellate court received
(Supp. Tr. of R.), and subsequently,
May 15, 1956 (Su
communication from petitioners' coun-
on or about May 2
the denial of the motion to vacate of
a telegraphic com
sel, protesting the

May 15, on the ground that petitioners had not previously received notice of the filing of affidavits and a brief by respondent in opposition to the motion to vacate. On May 31, 1956, the court below filed its per curiam opinion, holding that petitioners' objections were groundless for the reason that their motion to vacate judgment had been submitted to the appellate court at the time noticed by petitioners, and therefore, that they were without standing to object to matters presented by respondent in opposition to such motion at the time noticed. (See Appendix, infra, pp. i-ii.)

---

## REASONS WHY THE WRIT SHOULD BE DENIED.

### PRELIMINARY CONSIDERATIONS.

A review on writ of certiorari should be granted only where there are special and important reasons therefor; and the only reasons which generally will be considered by this Court, as set forth in subdivision 1(b) of Rule 19 of the Revised Rules of the Supreme Court, are as follows:

Where the court of appeals—

1. Has rendered a decision in conflict with the decision of another court of appeals on the same matter.

2. Has decided an important territorial question in a way in conflict with applicable territorial law.

3. Has decided an important question of federal law which has not been, but should be, settled by this Court.

4. Has decided a federal question in a way in conflict with applicable decisions of this Court.

5. Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Respondent submits that the reasons assigned by petitioners in support of their petition for writ of certiorari are in no sense of the term "special and important", and therefore, that this cause should not be reviewed by this Court.

---

### I. THE FAILURE OF RESPONDENT TO REPLY TO PETITIONERS' PURPORTED COUNTERCLAIM.

Petitioners incorporated into their answer to respondent's amended complaint what they termed a "Fourth Defense and Counterclaim", wherein they simply re-alleged the allegations of a prior affirmative defense, and then claimed damages in the amount of five million dollars in consequence of certain alleged actions by respondent. (R. 73-75.) They maintained that respondent's failure to reply to this portion of the answer constituted an admission of the allegations contained therein.

The District Court, and the Court of Appeals, held that such allegations were mere denials in affirmative form of the allegations of the complaint, and therefore were not admitted by respondent's failure to reply thereto, (Rule 8(c) FRCP), and that the allega-

tions as to damages similarly were not admitted because of the express provisions of Rule 8(d) FRCP.

This is certainly a logical construction of the pleadings and Rule 8 FRCP, and thus it can hardly be contended that this is an "important question of federal law which has not been, but which should be, settled by this Court." Rule 19, Revised Rules of the Supreme Court. Furthermore, petitioners do not point out wherein this determination is in conflict with any decision of this Court or in conflict with the decisions of another Court of Appeals on the same matter. The two Appellate Court decisions which petitioners do cite on page 13 of their petition, *Sun Maid, etc. Assn, v. Neustadter Bros.*, 115 F.2d 126 (CA-9), and *Peters & Russell v. Dorfman*, 188 F.2d 711 (CA-7), are completely inapposite.

---

## II. THE REFUSAL TO ADMIT IN EVIDENCE THE DEPOSITION OF WILLIAM L. PAPE.

Approximately two months prior to the trial of this action, respondent took the deposition of William L. Pape at Seattle, Washington. (R. 343-432.) At the trial, the District Court rejected petitioner's offer to read this deposition into evidence—finding from the evidence that Pape's failure to appear as a witness for petitioners was inexcusable, and furthermore, that the deposition was inadmissible because it was taken by respondent for discovery purposes only. (R. 99.)

Whether or not the second reason assigned by the trial court for rejection of this deposition is in accord with the provisions of Rule 26 FRCP, the fact remains, as pointed out by the court below, that there was nothing in Pape's deposition which had any bearing whatever on the two primary issues that had to be decided, and therefore, that petitioners were in no way prejudiced by the ruling of the District Court. This does not constitute a departure from accepted and usual course of judicial proceedings, nor does it represent in any sense of the term a decision on any important question of federal law. In respect to this alleged specification of error, petitioners have utterly failed to assert any reason, substantial or otherwise, that would justify a review by this Court.

---

### III. THE REFUSAL OF THE TRIAL COURT TO RESERVE DECISION PENDING THE APPEARANCE OF AN ADDITIONAL WITNESS FOR PETITIONERS.

Petitioners assert error in the court below in its failure to find that the District Court abused its discretion when the latter refused to grant petitioners' request for a continuance (R. 76, 88), and later, when it refused to reserve decision after trial R. 95) in order that William Pape could be produced as a witness. The court below, however, in answer to this specification of error, showed clearly why there was no abuse of discretion in the trial court, when it pointed out the following:

(a) Petitioners made no showing in their request for a continuance of the trial and for a reservation of decision just what material testimony Pape could give and how that could affect the outcome of the trial.

(b) Petitioners made no showing of diligence in securing Pape's presence by subpoena, or in the taking of his deposition—both of which petitioners had ample opportunity to do.

(c) At the time that petitioners moved for a continuance, the District Court offered to grant their motion on condition that they would pay the respondent the considerable costs that he had then incurred in securing the presence of his witnesses, but this offer was rejected by petitioners. (R. 152-159.)

Petitioners' motion to reserve decision in order that Pape's testimony could be taken at a later date was the equivalent of a motion for a new trial, the granting of which is in the sound discretion of the trial judge. *Blytheville Cotton Oil Co. v. Kurn*, 155 F.2d 467-470 (CA-6 1946.) The trial court's denial of such motion can hardly be termed a clear abuse of discretion, in the light of the failure of petitioners to show any newly discovered evidence, their failure to exercise diligence in securing Pape's presence by subpoena or in obtaining his deposition, and their failure to establish that Pape's testimony, whatever it might have been, would have probably produced a different result. Cf. *Chemical Delinting Co. v. Jackson*, 193 F.2d 123, 126-127. (CA-5 1951.)

Here there is no important question of federal law involved, there is an absence of conflict between

the decisions of the court below and decisions of this Court and other Courts of Appeal, and there has been no departure by either the District Court or the Court of Appeals from the accepted and usual course of judicial proceedings. Hence, petitioners have failed to establish any reason for granting the writ of certiorari.

---

### IV. THE REFUSAL OF THE TRIAL COURT TO GRANT PETITIONERS' MOTION FOR A NEW TRIAL.

On March 16, 1954, petitioners filed with the District Court their motion for a new trial, based in part upon what they claimed was "newly discovered evidence" (R. 107-108), and it is the trial court's denial of this motion (R. 118) that petitioners now contend constituted an abuse of discretion which ought to have been remedied by a reversal by the Court of Appeals.

Petitioners' new evidence consists of the affidavits of Peter Brown and John Breseman (R. 113-118), but a review of these affidavits fails to indicate where the testimony of these men would be anything but cumulative or impeaching, or even that it would be material. There is no showing by petitioners that such "evidence" was "discovered" since the trial and that petitioners have exercised reasonable diligence and therefore were excused from not having produced these witnesses at the time of trial. Furthermore, a careful reading of the affidavits indicates that it is most improbable that the testimony of these

men would have produced a different result. See *Chemical Delinting Co. v. Jackson*, supra, p. 127. The granting or denial of a motion for a new trial is entirely discretionary with the trial court, *Stephenson v. Steinhauer*, 188 F.2d 433, 439, (CA-8 1951); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474; and the record here makes it abundantly clear that there was more than sufficient room for a legitimate exercise of the District Court's discretion in refusing to grant a new trial—an exercise of discretion that ought not be reviewed by this Court.

---

**V. THE DISTRICT COURT'S RULING THAT OBJECTIONS TO THE SUFFICIENCY OF LOCATION NOTICES ARE AVAILABLE ONLY TO A SUBSEQUENT LOCATOR.**

As an affirmative defense (R. 71-73) petitioners challenged the validity of respondent's 45 mining claims, contending—

(a) That respondent's claims were not sufficiently described in the location certificates;

(b) That the claims were neither staked nor marked as required by law; and

(c) That no discovery had been made on each of respondents' claims.

The District Court found from the evidence that valid discoveries were made by respondent and that he had staked and marked his claims in compliance with the relevant statutory provisions (R. 106); and the court below found that there was sufficient evi-

dence to support such findings of the District Court. *Vevelstad, et al. v. Flynn*, 230 F.2d 695, 697-698.

With respect to petitioners' contention that the descriptions given in respondent's location certificates were inadequate, the District Court did express some doubt as to their sufficiency; but it went on to hold that, irrespective of any such defects, the question of sufficiency of descriptions was really not involved because such an objection is available only to a subsequent locator. In support of this ruling, the court cited the case of *J. E. Riley Inv. Co. v. Sakow*, 9 Alaska 427, affirmed in 110 F.2d 345. (R. 105.)

Petitioners now contend that this holding by the District Court was erroneous and subject to review by this Court, the grounds for such contention being that the *J. E. Riley Inv. Co.* case, supra, was based upon a 1915 territorial statute which was repealed in 1931, and thus was not in effect when respondent's locations were made in 1950.

However, a statute which was in effect in 1950, and which is still in effect, is Section 47-3-33 ACLA 1949, relating to certificates of location for both lode and placer mining claims. This statute contains these provisions:

> "Failure to file for record the Certificate of Location, within the ninety (90) days as herein provided, shall constitute an abandonment of the claim and the ground shall be open to location. Provided, however, That full compliance with the provisions of this Section, after the ninety (90) day period has elapsed but before the ground

has been located by another, shall operate to renew the location and save the rights of the original locator."

Ch. 10, Session Laws of Alaska 1915, which was considered in the *J. E. Riley Inv. Co.* case, contained this provision:

"A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator."

Substantially, those two statutes are identical; and hence, if a construction of the 1915 law justifies the conclusion that only a subsequent locator can avail himself of deficiencies in another locator's certifiicates, then a similar conclusion is justified in the construction of Section 47-3-33 ACLA 1949. Furthermore, such an interpretation is in complete accord with the purpose of such a law—it being to warn others of prior appropriation and to prevent a subsequent locator from being deceived or misled. See *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U.S. 12, 26. Petitioners, not being subsequent locators, were in no way prejudiced or misled even if there were deficiencies in respondent's location certificates; thus, the purpose of the statute (Sec. 47-3-33,

supra) was in no way subverted by the ruling of the District Court.

In addition, as the court below pointed out in its per curiam order denying the motion for rehearing (230 F.2d at p. 704), petitioners have overlooked the fact that the Court of Appeals went further than the District Court and held that respondent's location certificates were sufficient to satisfy the requirements of federal and territorial law. (230 F.2d at p. 701.) The court below was satisfied that there was ample evidence to support such a finding, and thus petitioners can claim no prejudice even assuming that the District Court was in error in holding that objections to location certificates are available only to a subsequent locator.

Again, petitioners have failed to set forth any special or important reason why their petition for a writ of certiorari should be granted.

---

**VI. WHETHER RESPONDENT, A CANADIAN CITIZEN, WAS DISQUALIFIED TO LOCATE MINING CLAIMS IN ALASKA.**

At the trial of this cause respondent testified that he was a Canadian citizen (R. 265); and petitioners maintain that he was thus not entitled to have his title to the mining claims established because of the provisions of a federal and territorial statute which reads in part, as follows:

> ". . . Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be

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to exploration and purchase, and
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by citizens of the United States
o have declared their intention to
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y, in answer to this contention, said
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l the United States was not a party
ontention was without merit under
*Kinley Creek Mining Co. v. Alaska*
*o.*, 183 U.S. 563, 572. Petitioners,
to distinguish this decision by say-
h they cannot attack respondent's
cision in the *McKinley* case did not
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n, since he located claims and was
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inction without a difference. In the
k case, supra, an action had been
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nts there, conceding proper discovery
y plaintiffs, nevertheless contended
iffs had to prove their citizenship in
a judgment because of the provisions
2319, which in substance is identical
A. Sec. 22, supra. In answer to this
s Court said in the *McKinley Creek*
). 272):

> "The appellants, however, deny the application of *Manuel v. Wulff*, and contend that this suit having been brought under Sec. 500 of the Oregon Code, in order to maintain the suit the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that, while the validity of the location may not be disputed by appellants, that the right to possession, which is but an incident of location, may be. We do not concur in this view. The meaning of *Manuel v. Wulff* is that the location by an alien and all of the rights following from such location are voidable, not void, and are free from attack by anyone except the government."

This Court's decision in the *McKinley Creek* case is a conclusive answer to the contention that petitioners make here. The court below, rather than deciding a federal question in a way that is in conflict with applicable decisions of this Court, has rendered a decision which is in complete accord with decisions of this Court. There has been assigned here, therefore, no reason which will impel this Court to review the cause.

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### VII. THE REFUSAL BY THE COURT BELOW TO VACATE JUDGMENT.

Petitioners have filed with this Court a supplemental petition for writ of certiorari, assigning as a reason why the writ should issue the refusal by the court below to grant petitioners' motion to vacate judgment. The relevant facts in respect to this contention are these:

(a) Judgment was entered by the District Court in favor of respondent on April 24, 1954. (R. 119-122.)

(b) The court below affirmed the judgment of the District Court on January 13, 1956, and denied petitioners' request for a rehearing on March 5, 1956. *Vordstad, et al. v. Flynn,* 230 F.2d 695.

(c) Petitioners filed their motion with the court below to vacate the judgment on May 7, 1956 (Supp. Tr. of R.), and noticed the same for hearing five days later, i.e., on May 11, 1956. This motion was denied on May 15, 1956. (Supp. Tr. of R.)

(d) On May 25, 1956, petitioners' counsel sent a telegram to the court below protesting that court's denial of the motion to vacate—on the ground that, in opposition to the motion, respondent had filed a memorandum and affidavits and that copies had not been served upon petitioners. (Second Supp. Tr. of R.)

(e) On May 31, 1956, the court below entered its per curiam order, stating that petitioners' telegraphic protest was groundless for the reason that their motion was submitted to the court at precisely the time noticed by them, and therefore that they were without standing to object to matter presented by respondent in opposition to the motion to vacate.

Petitioners' motion was made under Rule 60(b) FRCP, and the basis of the motion was alleged fraud perpetrated by respondent. But this rule, in permitting a court to relieve a party from a final judgment

where fraud of  of an adverse party is assigned as a
reason, provides  les that such a motion shall be made
not more than o  one year after the judgment was en-
tered.

In this case th  the judgment was entered on April 24,
1954 (R. 119-122  122), and petitioners filed their motion
to vacate more t  e than two years later. This one year
limitation means  ns what it says and cannot be enlarged
upon, *Ackerman*  *ann v. United States*, 340 U.S. 193, 197,
even by the taki  king of an appeal. See *Moore's Federal*
*Practice*, 2d Ed  2d., Vol. 7, p. 321, Sec. 60.28(2), foot-
note 37. Conseq  equently, the Court of Appeals did the
only thing that  at it was permitted to do under the
Rules when it  denied petitioners' motion to vacate
the judgment of  of the District Court.

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**CONCLUSION.**

The seven p  points relied upon by petitioners as
reasons for gra  anting a writ of certiorari, in no way
satisfy the crit  iteria by which this Court determines
that a case mer  rits consideration. There is no conflict
of opinion or a  authority between Courts of Appeals or
with decisions  of this Court, no decision of a terri-
torial question  in conflict with territorial law, no
important ques  stion of federal law not settled by this
Court, and no  departure from the established course
of judicial pr  oceeding. Rule 19, Revised Rules of
the Supreme C  Court. Petitioners have simply failed
to show any sp  ecial or important reason why the writ

should be granted. See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70.

Hence, for the reasons stated in this brief, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, Juneau, Alaska,
June 27, 1956.

JOHN H. DIMOND,
*Counsel for Respondent.*

N. C. BANFIELD,
GEORGE F. WARD,
*Of Counsel.*

**(Appendix Follows.)**

## Appendix

United States Court of Appeals
for the Ninth Circuit

No. 14,431

S. H. P. VEVELSTAD and AURORA NICKEL COMPANY, a corporation,
*Appellants,*

vs.

E. MILES FLYNN,
*Appellee.*

Before Healy, Pope and Fee, Circuit Judges.

Per Curiam:

On May 15, 1956, this Court denied the motion of appellants to vacate the judgment of the District Court. This motion was filed some four months after this Court's affirmance of the judgment of the District Court and two months after denial by this Court of appellants' petition for rehearing and the going down of the mandate to the District Court. The motion purported to be based on subdivision 3 of Rule 60(b) F.R.C.P. The Clerk of this Court has now received under date of May 25, 1956, telegraphic communication from counsel for the appellants protesting this Court's May 15 denial of the motion to vacate on the ground that the appellants had not previously received notice of affidavits and

brief filed by appellees in opposition to the motion to vacate. We treat this so-called "protest" as a motion to reopen consideration of the motion to vacate the judgment, and the same is denied.

Even if it were to be assumed that a motion under Rule 60(b) could properly be filed in this Court directed to a vacating of a District Court judgment, (see Rule 1 and compare United States v. Shaughnessy, 2 cir., 175 F.2d 211), yet this Court exercised its discretion not to grant the motions for reasons wholly unrelated to matters set forth in the brief and affidavits of the appellees. The motion was made long after the time permitted by Rule 60(b) and the same was supported only by affidavits setting forth inadmissible hearsay statements.

In any event appellants' objections now made are groundless for their motion was submitted to the court at the time noticed by them and they are without standing to object to matters presented by the appellee in opposition to the motion at the time noticed. While it is unnecessary to decide the point, it would appear highly improbable that Rule 60(b) extends the jurisdiction of this Court over the judgment of the court below beyond the date when petition for rehearing has been denied and mandate has been filed in the lower court.

/S/ Wm. Healy
/S/ Walter L. Pope
/S/ James Alger Fee
United States Circuit Judges

Endorsed: Filed May 31, 1956. Paul P. O'Brien, Clerk.

Chapter 10, Session Laws of Alaska, 1915

* * * * * * *

Section 2. Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

(a) The name or number of the claim.

(b) The name of the locator or locators.

(c) The date of discovery and of posting of the location notice.

(d) The number of feet in length and width of claim.

(e) It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator.

Section 47-3-1, Alaska Compiled Laws Annotated, 1949 (41 Stat. 437, 30 USCA Sec. 22)

*Deposits and lands open to exploration, occupation and purchase Regulations: Local customs and rules.* Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 47-3-33, Alaska Compiled Laws Annotated, 1949

*Certificate of location: Recordation: Time for: Contents: Failure to record: Effect: Compliance after ninety days.* The locator or locators of any lode claim or placer claim shall within ninety (90) days after the date of posting the notice of location on the claim, cause such claim to be recorded by filing with the Recorder of the Recording District in which the claim is located, a Certificate of Location which shall contain:

(a) The name or number of the claim;

(b) The number of feet in length and width of the claim;

(c) The date of discovering and of posting the notice of location;

(d) The name of the locator or locators;

(e) A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the Certificate of Location, within the ninety (90) days as herein provided, shall constitute an abandonment of the claim and the ground shall be open to location. Provided, however, That full compliance with the provisions of this Section, after the ninety (90) day period has elapsed but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator.

Section 56-1-91, Alaska Compiled Laws Annotated, 1949

*Action to determine adverse claim.* Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.